LIBRARY
SUPREME COURT, U. S.
F I
FEB
MICHAEL R

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1059

[redacted], FORTH CORPORATION, LEE LE MAY, ADMINISTRATOR OF THE ESTATE OF ROBERT W. CAREY, DECEASED,

Petitioners,

vs.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

JOINT PETITION OF FORTH CORPORATION AND LEE LE MAY, ADMINISTRATOR OF THE ESTATE OF ROBERT W. CAREY, DECEASED, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES E. ROCAP, JR.
THOMAS P. LEDGERWOOD
Attorneys for Forth Corporation
ROCAP, ROCAP, REESE & YOUNG
708 Union Federal Building
Indianapolis, Indiana 46204
Of Counsel

FLOYD W. BURNS
RICHARD R. McDOWELL
JAMES S. DOWNING
Attorneys for Estate of Carey
CADICK, BURNS, DUCK & NEIGHBOURS
800 Union Federal Building
Indianapolis, Indiana 46204
Of Counsel

C. E. Pauley & Co., Inc., Indianapolis

INDEX

	Page
List of Authorities	ii
Opinion Of The Court of Appeals	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Reasons For Granting This Writ	2
Statement Of The Case	5
Factual Background	5
Proceedings In The District Court	5
Proceedings In The Court of Appeals	7
I. Did the Court of Appeals err when it weighed the evidence contrary to Rule 52(a) F.R.C.P. and determined that the findings of fact setting forth the contributory negligence of Allegheny Airlines, Inc., were clearly erroneous?	8
II. Did the Court of Appeals err in determining that Forth Corporation was vicariously liable for the acts of the pilot pursuant to the Uniform Aeronautics Act which holding is in contradiction with other circuits interpreting similar statutes?	14
III. Whether or not the application of the doctrine of collateral estoppel against a litigant deprives the litigant of his rights to a trial by jury.	18
Conclusion	22

LIST OF AUTHORITIES

Page

Beacon Theaters v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 2d 988, 1958 20

Blonder-Tongue Labs. v. University Foundation, 402 U.S. 313, 28 L.Ed. 2d 788, 91 S. Ct. 1434 21

Ferrari v. Byerly Aviation, — Ill. App. —, 268 NE 2d 558 16

Haskins v. Northeast Airways, Inc., Minn. Supp. 123 NW 2d 81 16

Hays v. Morgan, 5C.A., 221 F.2d 481, 1955 15

Hoebee v. Howe, 98 N.H. 97, A2d 223, 1952 15

Jay v. Holman, 106 Ind. App. 413, 20 NE 2d 646, 1939 17

Lamasters v. Snodgrass, 248 Iowa 1377, 85 N.W. 2d 622, 1957 15

McCord v. Dixie Aviation Corp., 10 C.A., 450 F. 2d 1129, 1971 16

Pierce v. Horvath, 142 Ind. App. 278, 233 NE 2d 811, 1966 13

Rachal v. Hill, 435 F. 2d 59, 5 CA, 1970 19

Rogers v. Ray Gardner Flying Service, Inc., 1970, C.A. 5 Tex., 435 F. 2d 1389, 11 ALR Fed. 891, cert. denied, 401 U.S. 1010, 28 L.Ed. 2d 546, 91 S. Ct. 1255 16

Rosedail v. Western Aviation, Inc., D.C. Colo., 297 F. Supp. 681, 1969 16

Ross v. Apple, 240 NE 2d 825, 143 Ind. App. 357, 1968 15

United States v. Miller, 303 F.2d 703, 9 C.A., 1962 13

Page

United States v. Yellow Cab, Ill. 1949, 70 S. Ct. 177, 338 U.S. 338, 94 L.Ed. 150 14

Yelink v. Worley, 1968, D.C. Va., 284 F. Supp. 679 16

Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. 1562, 1969 9

Federal Statutes

49 U.S.C. 1301 (26) 2

28 U.S.C. 1254 (1) 2

State Statutes

Hurd's Statutes, Illinois, Chapter 15½, Section 22.11, Ill. Rev. Stat. 1985 18

Indiana Code 1971, 8-21-3-1(h) (Burns Ind. Stat. Annot. 14-901(h)) 15

Indiana Code 1971, 8-21-4-8 (Burns Ind. Stat. Annot. 14-109) 2

Indiana Code 1971, 8-21-4-5 (Burns Ind. Stat. Annot. 14-106) 2

Federal Rules of Civil Procedure

Rule 41(b) 6

Rule 52(a) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. _____

UNITED STATES OF AMERICA, FORTH CORPORATION, LEE LE MAY, ADMINISTRATOR OF THE ESTATE OF ROBERT W. CAREY, DECEASED,

Petitioners,

vs.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

JOINT PETITION OF FORTH CORPORATION AND LEE LE MAY, ADMINISTRATOR OF THE ESTATE OF ROBERT W. CAREY, DECEASED, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 16, 1974.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit in Cause No. 73-1237 is reported in 504 F.2d 104, 1974. A copy of the Opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 16, 1974. A joint petition for rehearing was denied by the Court of Appeals on Novemebr 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A copy of the ruling on the Joint Petition for Rehearing is attached hereto as Appendix B.

QUESTIONS PRESENTED

[1] Did the Court of Appeals err when it weighed the evidence contrary to Rule 52(a) F.R.C.P. and determined that the findings of fact setting forth the contributory negligence of Allegheny Airlines, Inc. were clearly erroneous?

[2] Did the Court of Appeals err in determining that Forth Corporation was vicariously liable for the acts of the pilot pursuant to the Indiana Uniform Aeronautics Act, which holding is in contradiction with other circuits interpreting similar statutes?

[3] Whether or not the application of the doctrine of collateral estoppel against a litigant deprives a litigant of his right for trial by jury.

STATUTES INVOLVED

The federal statutes involved are 49 U.S.C. 1301(26) [which was redesignated in 1974 as 49 U.S.C. 1301(28)]. The legislative acts of the Indiana Legislature involved are Indiana Codes §§ 8-21-3-1(h) [Burns Ind. Stat. Annot. § 14-109(h)], 8-21-4-5 [Burns Ind. Stat. Annot. § 14-106] and 8-21-4-8 [Burns Ind. Stat. Annot. § 14-109]. These statutes are set forth in Appendix C.

REASONS FOR GRANTING THIS WRIT

Admittedly the most compelling question involving the aviation industry, the legal profession, and the insurance

industry, which has arisen as a result of the mid-air collision at Fairland, Indiana on September 9, 1969, is set forth in the joint petition for writ of certiorari in the companion case of Forth Corporation, et al vs. Allegheny Airlines, et al, which is being filed contemporaneously with this petition.

This was only the property damage case which was tried after Allegheny Airlines, Inc. and the United States of America had voluntarily compromised all of the passenger claims on a joint basis.

While we contend that the Court of Appeals for the Seventh Circuit set forth erroneous principles of law and fact in its opinion of September 16, 1974, three of those errors stand out as matters of the greatest of public interest and seemingly are of such importance as to require the attention of this Court.

First, we contend that the Court of Appeals violated the principles and the spirit of Rule 52(a) F.R.P.C. by weighing the evidence. This is becoming a matter of prime concern in not only the legal profession but to the judiciary at the trial court level. As shown in other parts of this brief, the opinion of the Court of Appeals is replete with language showing that they attached credibility to some witnesses, refused to consider the testimony of other witnesses as substantial and, in general, determined the facts for themselves.

It is our belief that where such an obvious violation of Rule 52(a) F.R.C.P., as shown by the opinion, this Court should speak on the subject of whether it shall be the modern trend of the law to permit courts of appeal to take the place of a trial judge as a thirteenth juror. If this be the desire of this Court, then the legal profession and judiciary should so be informed.

Secondly, we raise the question of whether the absentee owner of an aircraft can be charged with responsibility

for the careless and reckless operation of his aircraft by another. This matter is of great concern to the vast general aviation industry including the flying schools, the airports, and the more-than-two-hundred-thousand private aircraft owners. It is of great import to the insurers who agree to indemnify the owners of the aircraft because it plays an important part in the premiums charged by these insurers. It is important to the Courts who are confronted with more and more of this type lawsuits. Primarily, it is important that this Court speak upon this subject because, as shown elsewhere in this petition, the law is in a state of complete confusion and the decision of the Court of Appeals for the Seventh Circuit further compounds a hundredfold the problems already facing courts to interpret the various statutes involved.

Third, the matter of collateral estoppel being available to co-defendants with the United States of America in a Federal Tort Claims case is a paramount issue to the federal trial courts. There is an ever growing tendency in the federal court system to join the United States of America, who can be sued only under the Federal Tort Claims Act without a jury, and a private citizen entitled to a trial by jury in the same cause of action. While this matter was not directly decided by the Court of Appeals the footnote to the opinion raises the question that the only proper way for a court to handle this situation is to have an advisory jury. This is no solution because either the trial court has to follow the jury's recommendations which, in effect, abrogates the intent of the Federal Tort Claims Act, or you have two triers of the fact hearing the same evidence, in the same courtroom, rendering conflicting decisions. It is imperative that this apparent irreconcilable conflict be ruled on by this Court so that the legal profession and the federal judiciary can be in-

formed as to the proper procedure when confronted by this situation in the future.

• • •

STATEMENT OF THE CASE

Factual Background

This case arises out of a mid-air collision which occurred on September 9, 1969, in the airspace over Fairland, Indiana, between an Allegheny Airlines DC-9 jet aircraft and a Piper Cherokee aircraft being flown by Robert W. Carey. The Piper Cherokee was owned by Forth Corporation, a wholly owned subsidiary of Brookside Corporation. All occupants of both aircraft were killed in the accident.

At the time of the mid-air collision, the Allegheny DC-9 was being operated under an instrument flight rules clearance from Cincinnati, Ohio to Indianapolis, Indiana and was receiving air traffic control directions from the Federal Aviation Administration facilities located at Weir Cook Airport in Indianapolis. The Piper Cherokee aircraft was being operated under visual flight rules on a cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana.

Allegheny Airlines, Inc. and GECC Leasing Corporation commenced this case in the United States District Court for the Southern District of Indiana as Cause No. IP 70 C 609. The Defendants were the United States of America, Forth Corporation, Brookside Corporation and Lee LeMay, Administrator of the Estate of Robert W. Carey, Deceased. Jurisdiction was based on diversity of citizenship and the Federal Tort Claims Act.

Proceedings in the District Court

The case against the United States of America was under the Federal Tort Claims Act and tried before The

Honorable Cale J. Holder without the intervention of a jury contemperaneously with the case against Forth Corporation, Brookside Corporation and Lee LeMay, Administrator, et al, with a jury sitting.

All evidence was presented by the plaintiffs in the presence of both Judge Holder and the jury.

At the conclusion of the plaintiffs' case, the United States of America filed its motion for judgment on the evidence pursuant to Rule 41(b) F.R.C.P. The remaining defendants filed their motions for judgment on the evidence and the motions of Forth Corporation and Lee LeMay, Administrator, et al, were overruled. The motion of Brookside Corporation was sustained.

The Court then entered its findings of fact pursuant to Rule 41(b), F.R.C.P. concluding that the plaintiffs were guilty of contributory negligence. A copy of the pertinent findings of fact are attached as Appendix D.

Subsequent to the Court's findings of fact and judgment in favor of the United States of America, the Defendants Forth Corporation and Lee LeMay, Administrator, et al filed their motion for summary judgment on the theory that the plaintiffs were collaterally estopped from recovery against the Defendants Forth Corporation and Lee LeMay, Administrator, et al, by reason of the judgment of the Trial Court in favor of the United States of America and finding contributory negligence on behalf of the plaintiffs. Said motion for summary judgment was sustained and judgment entered for the Defendants Forth Corporation and Lee LeMay, Administrator, et al.

The Trial Court also found that GECC Leasing Corporation was not the real party in interest and dismissed its claim.

Proceedings in the Court of Appeals

Allegheny Airlines, Inc. and GECC Leasing Corporation both appealed from the adverse judgments.

The case was argued before the United States Court of Appeals for the Seventh Circuit on February 14, 1974 before The Honorable Luther M. Swygert, The Honorable Roger Kiley and The Honorable Julius J. Hoffman, who was sitting by designation. The Honorable Roger Kiley died September 6, 1974. This case was decided September 16, 1974. A footnote to the opinion states, "Judge Kiley approved this opinion before he died on September 6, 1974".

The opinion of the Court of Appeals upheld the Plaintiffs Allegheny Airlines, Inc. and GECC Leasing Corporation in almost every point of contention raised in the brief. The opinion in most instances is verbatim with the brief of the Appellants.

The Court of Appeals decided that the findings of fact of Judge Holder were clearly erroneous and not supported by substantial evidence.

Having determined that the findings of fact of the Trial Judge were clearly erroneous the Court of Appeals then found that the motion for summary judgment in favor of the Defendants-Appellees Forth Corporation and Lee LeMay, Administrator, et al, based on the doctrine of collateral estoppel had to fail. By footnote, the Court of Appeals further stated that the plaintiffs were deprived of a trial by jury by entering a judgment for collateral estoppel.

The Court of Appeals further found that Forth Corporation was vicariously liable for the acts of Robert W. Carey who had leased the aircraft from Forth Corporation by reason of certain Indiana statutes and construed such statutes, which were taken verbatim from 49 U.S.C.

1301(26), which holding was contrary to interpretations of other districts on similar statutes.

While the jurisdiction of the Court was based on diversity of citizenship, the Court of Appeals determined that there was sufficient evidence to show joint enterprise between Forth Corporation and Robert W. Carey, contrary to the law of the State of Indiana.

Forth Corporation and Lee LeMay, Administrator, et al, filed a joint petition for rehearing *en banc*. The United States of America filed its separate petition for rehearing. The petitions were denied on November 26, 1974, with two of the Circuit Judges voting to grant said petition for rehearing *en banc*.

• • •

I.

Did the Court of Appeals err when it weighed the evidence contrary to Rule 52(a) F.R.C.P. and determined that the findings of fact setting forth the contributory negligence of Allegheny Airlines, Inc., were clearly erroneous?

While the Trial Court made five findings of fact as to the contributory negligence of Allegheny Airlines, Inc., without waiving any of said points in the event of remand, we will set forth only two of the findings with the evidence in support thereof to show that Judge Swygert in his opinion improperly weighed the evidence thus failing to follow the principles of this Court in the construction of Rule 52(a) F.R.C.P.

The pertinent part of Rule 52(a) is as follows:

> "(a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be

> given to the opportunity of the trial court to judge of the credibility of the witnesses."

In the case of *Zenith Radio Corp.* v. *Hazeltine Research*, 395, U.S. 100, 23 L.Ed.2d 129, 89 S. Ct. 1562, 1969, Mr. Justice White stated:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.'"

This is not a question of the trial court interpreting evidence one way and the reviewing court interpreting the evidence in a different way. This part of the petition is based solely upon the proposition that the Court of Appeals completely disregarded the prevailing rule against its right to weigh conflicting evidence, usurped the right of the Trial Court, as the trier of the fact, to determine the credibility of evidence and failed to recognize the proposition that the Trial Court was in a superior position to apprise and weigh the evidence.

Two of the findings of fact of the Trial Court which led to its holding of contributory negligence on the part of Allegheny Airlines, Inc. are:

> [1] The collision occurred . . . five hundred feet (500') or more below the base of the clouds. [2] Allegheny . . . failed to exercise ordinary care . . .

> under all the circumstances . . . in that its crew conducted the aircraft descent from cruise altitude at a descent rate which was excessive under the circumstances through clouds and which would not permit plaintiff's aircraft to be slowed to the required rate of descent of five hundred feet (500′) per minute at one thousand feet (1,000′) above the assigned altitude of two thousand five hundred feet (2,500′).

The first point to be considered is whether the finding of fact that the mid-air collision occurred more than five hundred feet (500′) below the base of the clouds was clearly erroneous. We submit that the Court of Appeals had to weigh the evidence to arrive at this conclusion rather than follow the standard set forth under Rule 52(a). The evidence admitted at the trial as to the height of the cloud base at the accident site consisted mainly of estimates and opinions given by pilots flying in the area between a period of forty minutes before the established time of the collision and forty minutes after.

The collision occurred over the cornfield. There were no trained weather observers at the site and the only evidence presented by the plaintiffs as to the cloud base was from a weather observer at Weir Cook Airport, pilots and witnesses in the area and a weather expert who based his opinion upon the weather maps and reports available on the date of the collision. His conclusion was made many months after the collision as he was not present at the site nor had he visited the site. See the chart attached as Appendix E.

The trained weather observer who gave testimony was one Mr. Evan McColly [Tr. P. 148]. He stated that at 1940 g.m.t. or approximately ten-to-eleven minutes after the collision, he made a special observation at Weir Cook Airport with the aid of a ceilometer. He observed the cloud base to be at 4197 feet m.s.l. with a sixty-to-ninety

percent coverage of the sky [Tr. P. 454-6]. The visibility was fifteen miles which he stated was "what you can see" for fifteen miles in one direction [Tr. P. 459]. The observation made by Mr. McColly at 1940 g.m.t. was a measured observation in the manner prescribed by the United States Weather Bureau. The site of the collision was approximately twenty miles southeast of Weir Cook Airport and the evidence was that the collision occurred at 3600 feet m.s.l. or 3628 feet m.s.l. The wind direction was moving weather southeasterly. With a cloud cover of sixty-to-ninety percent, in a fifteen mile radius, there were numerous holes in the cloud base.

Mr. C. Harvey Bradley, Sr., now deceased, was flying in the area of the crash site a few minutes after the accident occurred. He had been dispatched there by the airport controller when it had been determined that the DC-9 was down. He testified he did not think there was any difference between the cloud base at Weir Cook and the cloud base at the accident site [Tr. P. 3431]. Captain Johannesen, an American Airlines pilot who came into Weir Cook Airport over the general area approximately twenty minutes prior to the agreed time of the mid-air collision, testified that in his opinion the cloud base in the area of the accident scene was substantially of the altitude of that at Weir Cook Airport. Mr. Bradley estimated the cloud base at approximately 3900 feet m.s.l. Captain Johannesen estimated the cloud base at 3500 feet m.s.l.

With these two learned men making estimates of a rather uniform cloud base between Weir Cook and the site of the mid-air collision, with the weather moving southeasterly, and with an actual measured cloud base showing some sixty-to-ninety percent coverage by a trained weather observer with a mechanical measuring device, at 4197 feet m.s.l., the Trial Judge, based upon the credibility of all other witnesses, determined that the mid-air collision oc-

curred more than 500 feet below the cloud base. This was in keeping with the weather observation by trained expert and the agreed altitude of the collision between 3600 and 3628 feet m.s.l.

Certainly the Trial Judge had more than substantial evidence upon which to base this finding of fact.

To show that Judge Swygert in his opinion weighed the evidence rather than follow Rule 52(a), we call the Court's attention to such statements as, "in our judgment the evidence emphasized by the defendants cannot reasonably support the inference . . . the clouds above the accident site were 4197 feet m.s.l. We do not think this evidence is of such persuasion as to avoid a determination that the court's finding was clearly erroneous." Again, the opinion sites, "Allegheny has produced an abundance of evidence," and "Allegheny's evidence is persuasive that the Piper Cherokee aircraft piloted by Carey was closer to the clouds than the required distance of 500 feet." Also, Judge Swygert said, "Defendants urge that even in the face of this evidence which is highly supportive of Allegheny's contentions. . . ."

In footnote four the Court said, "We only note there was substantial evidence favorable to the plaintiffs as to the altitude of the clouds."

As to the second finding as set forth above, the mid-air collision occurred between 3600 feet m.s.l. and 3628 feet m.s.l. [Tr. P. 568-570]. The DC-9 was descending at a rate of 2350 feet per minute and forty feet per second during the last minute of its flight [Tr. P. 582-584]. The assigned altitude which the DC-9 was to reach was 2500 feet m.s.l. [Tr. P. 2420].

The parties entered into a stipulation that the prevailing rule of conduct was, "if an altitude change of more than 1000 feet is required, descend or climb as rapidly as practical to 1000 feet above or below the assigned altitude and

then attempt to descend or climb at a rate of 500 feet per minute until the assigned altitude is reached," [Tr. P. 3966-3971]. In this case the evidence showed that the DC-9 was descending in excess of four times the rate of 500 feet per minute at a point approximately 100 feet above the point where he should attempt to slow the rate of descent to 500 feet per minute.

The case was tried under Indiana law and the test for negligence is that degree of care which an ordinarily prudent person would exercise under the same or similar circumstances.

Pierce v. *Horvath,* 142 Ind. App. 278, 233 NE2d 811, 1966. In considering due care, one must always consider the surrounding conditions and circumstances.

The pilot of the DC-9 was descending his aircraft through clouds in preparation for a landing at Weir Cook Airport. The aeronautical chart of the area showed several small airports within a twenty-five mile radius of Weir Cook Airport [Tr. P. 954-958]. The plaintiffs' expert testified that at the rate of descent which the undisputed evidence showed the DC-9 to be descending, needed nineteen to twenty-eight seconds to avoid another aircraft under the circumstances as they existed at the time of the mid-air collision [Tr. P. 4215-4218]. The undisputed evidence was also that if an aircraft descending at 2350 feet per minute broke out of the clouds he would have twelve to fourteen seconds to see and avoid a plane 500 feet below the clouds. Therefore, under Allegheny Airlines' evidence the DC-9 pilots were descending at such a rate under the circumstances that as they broke out of the clouds and immediately saw a plane 500 feet below, they could not avoid hitting it. In the case of *United States* v. *Miller,* 303 F.2d 703, 9 C.A., 1962, held that a pilot must expect and anticipate the liklihood of conflicting traffic and use precautions to avoid it.

From the undisputed evidence, from the rate of descent, the time necessary to see an aircraft 500 feet below the clouds and the time that it would take the DC-9 pilots to see the aircraft at the undisputed rate of descent, the DC-9 could not have avoided colliding with the Piper Cherokee regardless of its distance below the clouds. The Trial Court would not even have to indulge in inferences but could draw only one conclusion from the evidence and that is that the pilots of the DC-9 failed to use ordinary care in their rate of descent and that such failure proximately caused the mid-air collision.

In his opinion Judge Swygert stated, "it might be established that Allegheny's excessive rate of descent was not the proximate cause of its injuries". The Court of Appeals was not sitting as trier of the fact and as such it was not their duty nor their right to say what "might be established" as the proximate cause. Proximate cause is always for the trier of the fact and not the reviewing court. Inasmuch as the evidence on this point was almost undisputed evidence, the Court of Appeals could not arbitrarily say that this finding of fact was clearly erroneous because even if they would differ with the conclusion drawn by the Trial Judge the differing of conclusions is not sufficient to disturb the findings of fact of the trier of the fact.

United States v. *Yellow Cab*, Ill. 1949, 70 S. Ct. 177, 338 U.S. 338, 94 L. Ed. 150.

II.

Did the Court of Appeals err in determining that Forth Corporation was vicariously liable for the acts of the pilot pursuant to the Uniform Aeronautics Act which holding is in contradiction with other circuits interpreting similar statutes?

Robert W. Carey was a student pilot who had rented the Piper Cherokee from Forth Corporation which was the owner of the aircraft and was conducting a flying school. Robert W. Carey was solo on a cross country flight at the time of the mid-air collision.

Allegheny Airlines, Inc. contended that Forth Corporation was vicariously liable because of certain Indiana Statutes Code Nos. 8-21-3-1(h), 8-21-4-8 and 8-21-4-5 Appendix C.

Admitting that there was no controlling case law in Indiana the Court of Appeals adopted the rationale of three cases:

> *Hoebee* v. *Howe,* 98 N.H. 97, A2d 223, 1952,
> *Hays* v. *Morgan,* 5 C.A., 1955, 221 F.2d 481,
> *Lamasters* v. *Snodgrass,* 248 Iowa 1377, 85 N.W. 2d 622, 1957.

and decided that Indiana would follow this rationale citing in support thereof, *Ross* v. *Apple,* 240 NE 2d 825, 143 Ind. App. 357, 1968.

Ross v. *Apple,* supra, decided that the trial court had erred in sustaining a demurrer to a complaint which had raised the question of the absentee owner's liability under similar Ohio Statutes with the comment:

> "Whether such considerations (citing Hays v. Morgan, supra) would demand the same result in Ohio is now the question here. Rhetorical paragraphs 9 through 16 of the amended complaint clearly state facts sufficient to raise this issue and the plaintiff-appellant should be given an opportunity to introduce his evidence on that point." [parentheses ours]

Hays, supra, was a case decided by the Court of Appeals of the Fifth Circuit and had held the owner liable.

True, that the three cases of *Hays, Hoebee and Lamasters,* supra, decided between 1955 and 1957 affixed

liability to the absentee owner based upon statutes similar to those of Indiana. However, Indiana modeled its statute after the federal statute which is now 49 USC 1301(26).

A thorough search shows that only two cases decided this issue (one for and one against liability of the owner) until 1968. Then in rapid succession various courts decided cases involving either 49 U.S.C. 1301(26) or similarly worded state statutes and in each case the Court held that vicarious liability did not attach to the owner and the statute was not intended to impose civil liability on the owner for the negligent acts of the operator. These cases are:

McCord v. Dixie Aviation Corp., 10 C.A., 1971, 450 F2d 1129,

Rogers v. Ray Gardner Flying Service, Inc., 1970, C.A. 5 Tex., 435 F.2d 1389, 11 ALR Fed. 891, cert. denied, 401 U.S. 1010, 28 L.Ed. 2d 546, 91 S. Ct. 1255,

Yelink v. Worley, 1968, D.C. Va., 284 F. Supp. 679,

Rosedail v. *Western Aviation, Inc.*, D.C. Colo., 297 F. Supp. 681, 1969,

Haskins v. *Northeast Airways, Inc.*, Minn. Sup. 123 NW2d 81,

Ferrari v. *Byerly Aviation*, — Ill. App. —, 268 NE2d 558.

In the case of *McCord* v. *Dixie Aviation*, supra, Tenth Circuit Court of Appeals said:

> "The hard core 'public policy' issue raised by the appellants here goes to the 'deep pocket' theory . . . appellants contend that it is the 'deep pocket' of the fixed base operator who has the most assets to reach and that, as a matter of public policy, it would be convenient, logical, and consistently evenharded to impute negligence to the fixed base operator. Our response is that if Congress had intended to impose strict liability on the owner-bailor it was

> capable of clearly and directly so providing . . . The Act particularly provides that nothing therein shall in any way abridge or alter the remedies now existing at common law or by statute."

As said previously Indiana modeled its Uniform Aeronautics Act after the Federal Aviation Act as it existed in 1927. Even then, Indiana adopted the following statute:

> "The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land." *Indiana Code 8-21-4-5.*

So as the Federal statute provides that nothing therein shall abridge the remedies existing at common law or by statute, the Indiana Uniform Aeronautics Act provides that the law of torts in aircraft shall be governed by the law of torts on land.

It is well settled law in Indiana that the owner of a vehicle is not liable for the acts of the operator without the showing of agency, respondeat superior, negligent entrustment or a defective instrumentality.

> *Jay* v. *Holman,* 106 Ind. App. 413, 20 NE2d 656, 1939.

If it were only a question of the narrow interpretation of Indiana law, we could easily say that the Court of Appeals merely misread the Indiana law or looked no further than the Appellant's Brief to search out the true construction of the statute. But a written decision by such a high tribunal as the Court of Appeals should not be so lightly dismissed. 49 U.S.C. 1301(26) is the model for every similar statute in every state where the Uniform Aeronautics Act has been or will be adopted. As shown above, already in the Fifth Circuit, the State of Mississippi has

interpreted the modeled statute one way and the Court of Appeals has interpreted it a different way.

The Tenth Circuit has given the same interpretation as the Fifth Circuit.

In the Seventh Circuit, the Supreme Court of Illinois in *Ferrari* v. *Byerly,* supra, unequivocably ruled that a statute the same as the Indiana statute, imposed no liability on an absentee owner. Then the Seventh Circuit Court of Appeals in this case rules directly contrary to the existing majority and prevailing view.

Thus, there are not only conflicts between the Circuits but conflicts within the Circuits in the interpretation of identically worded statute.

Air traffic transcends State and Circuit lines. If the Uniform Aeronautics Act is to be a Uniform Act and to serve the purpose for which it is enacted by the several states and the United States, then it is imperative in the public interest and the interest of justice that there be a uniform interpretation of 49 U.S.C. 1301(26), Indiana 8-21-3-1, Illinois Chapter 15½, Section 22.11, Ill. Rev. Stat. 1965 and all other exact worded statutes.

Orderly developed law leads to an orderly developed society and orderly justice.

III.

Whether or not the application of the doctrine of collateral estoppel against a litigant deprives the litigant of his rights to a trial by jury.

The issues in this case are interdependent. The Trial Court granted the motion of the Defendant United States of America, made pursuant to Rule 41(b) F.R.C.P. to dismiss on the theory that the evidence showed the Plaintiff Allegheny Airlines, Inc., was contributorily negligent and could not recover.

This was a final judgment. The Defendants Forth Corporation and Lee LeMay, Administrator, et al, filed a motion for summary judgment under the doctrine of collateral estoppel.

The Court granted the motion for summary judgment and entered judgment on behalf of said Defendants Forth Corporation and Lee LeMay, Administrator, et al.

As otherwise set out in this petition, if this Court does not find that the evidence supports the Trial Judge's findings and the granting of the Rule 41(b) F.R.C.P. motion, then of course, there would be no valid judgment on which to base a finding of collateral estoppel.

In its opinion, the Court of Appeals held the findings of the Trial Court to be clearly erroneous and the Trial Court erred in sustaining the motion for summary judgment on the theory of collateral estoppel. Clearly, this issues rises or falls with the issue of whether or not the Trial Court's findings of contributory negligence on the part of Allegheny Airlines, Inc. was supported by the evidence or clearly erroneous.

However, this portion of this petition is not concerned with the aforementioned but rather with the footnote in which the Court of Appeals holds that while they are not directly passing on the propriety of the Trial Court's action in implementing the doctrine of collateral estoppel,

> "... we are impelled to say that we strongly disapprove of the procedure utilized."

The Court of Appeals held that the procedure used,

> "... in substance short circuits plaintiffs' right to a trial by jury. ..."

As authority for its position, the Court of Appeals cites the case of *Rachal* v. *Hill,* 435 F.2d 59, 5 CA, 1970.

The *Rachal case,* supra, relied upon by Judge Swygert in his opinion involves litigation arising out of complex

corporate S.E.C. violations and shareholder suits. For purposes of this petition, however, a judgment was entered against a litigant in a prior S.E.C. injunction suit. This same litigant filed suit as a plaintiff in a second lawsuit on the same issue. In the second lawsuit the doctrine of collateral estoppel was implemented and the plaintiff in the second lawsuit was prevented any recovery because of the judgment rendered against him in the prior S.E.C. injunction suit.

The issue involved in the *Rachal case,* supra, is since the litigant in the prior S.E.C. injunction lawsuit had no right to a jury trial in that litigation, and since it had a right to a jury trial in the second litigation, the use of collateral estoppel circumvented its right to trial by jury in the second suit.

In deciding the *Rachal case,* supra, the Court of Appeals relied heavily upon *Beacon Theaters* v. *Westover,* 359 U.S. 500, 79 S. Ct. 948, 3 L.Ed. 2d 988, 1958. The *Beacon case,* supra, sets out the general rule that a judgment in a prior suit under 28 U.S.C. § 2201, 2202, the Federal Declaratory Judgment Act, may not be used to support the doctrine of collateral estoppel and cause a second suit to be dismissed if the issues in the second suit are the same, and may be tried by a jury.

The *Beacon case,* supra, fundamentally deals with a situation where issues in equity and law may be tried either separately or together. Since this order of trial is discretionary with the trial judge and since there is no trial by jury under 28 U.S.C. §§ 2201, 2202, the trial judge by his discretion could pick the equity issue to be tried first. If this were determined adversely to a party his right to a trial by jury could be lost on the same issue. It should be pointed out that the *Beacon case,* supra, deals only with equity issues such as injunctions or declaratory judg-

ments under 28 U.S.C. §§ 2201, 2202, being decided first and preventing a later trial.

The *Rachal case,* supra, also dealt with prior S.E.C. injunction hearing, an equitable hearing.

These cases are not dispositive of the issue here, however. The cases tried before the Trial Judge in the matter at bar were both cases involving questions of law. The United States of America's case was tried under the Federal Tort Claim Act for which no jury trial is available. The same plaintiff's case as to the other defendants was tried to a jury.

The basis for the doctrine of collateral estoppel is to prevent the same issue from being tried twice. The case of *Blonder-Tongue Labs* v. *University Foundation,* 402 U.S. 313, 28 L.Ed. 2d 788, 91 S. Ct. 1434, sets out that the real and only question is whether or not the party against whom the prior judgment is being assessed under the doctrine of collateral estoppel had a full and fair opportunity for judicial resolution of the same issue. A party who has had an opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time.

The case at bar, where all parties were present, participated, and cross-examined, was the classical case for allowing a judgment against one defendant to be used by other defendants as collateral estoppel.

The cases relied upon by Judge Swygert in his opinion are where there was a prior decision wherein such decision was in a Court of Equity in a declaratory judgment or injunction proceeding. A Judge sitting in those proceedings operates under a different criteria than a Judge sitting as trier of fact in a Federal Tort Claims case. If the opinion of the Court of Appeals is permitted to stand in this case, there would be no instance where a judgment rendered

under the Federal Tort Claims Act could be utilized as a defense of prior adjudication under the doctrine of collateral estoppel. No case relied upon by the Court of Appeals supports this holding and it is definitely in opposition to the doctrine set out in *Blonder-Tongue Labs* v. *University Foundation case,* supra.

CONCLUSION

For the foregoing reasons, the Joint Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

James E. Rocap, Jr.
Thomas P. Ledgerwood
Attorneys for Forth Corporation
Rocap, Rocap, Reese & Young
708 Union Federal Building
Indianapolis, Indiana 46204
Of Counsel

Floyd W. Burns
Richard R. McDowell
James S. Downing
Attorneys for Estate of Carey
Cadick, Burns, Duck & Neighbours
800 Union Federal Building
Indianapolis, Indiana 46204
Of Counsel

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 73-1273

ALLEGHENY AIRLINES, INC., and G.E.C.C. LEASING CORPORATION, *Plaintiffs-Appellants,* v. UNITED STATES OF AMERICA, ET AL., *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 70 C 609 CALE J. HOLDER, Judge

ARGUED FEBRUARY 14, 1974—DECIDED SEPTEMBER 16, 1974

Before SWYGERT, *Chief Judge,* KILEY, *Senior Circuit Judge,*[1] and HOFFMAN, *Senior District Judge.*[2]

SWYGERT, *Chief Judge.* Plaintiffs, Allegheny Airlines, Inc. (Allegheny) and GECC Leasing Corp. (GECC) appeal from final judgments entered in favor of defendants, Brookside Corporation (Brookside), Forth Corporation (Forth is a wholly-owned subsidiary of Brookside), the United States, and the estate of Robert W. Carey. As a result of a mid-air collision on September 9, 1969 near Fairland, Indiana between an Allegheny aircraft en route to Indianapolis and a Piper Cherokee aircraft owned by Forth and operated by Carey who was a student pilot, plaintiffs brought suit to recover $3,750,000 for the de-

[1] Judge Kiley approved this opinion before he died on September 6, 1974.

[2] Honorable Julius J. Hoffman of the United States District Court for the Northern District of Illinois is sitting by designation.

struction of Allegheny's DC-9-31 aircraft and to recover $250,000 for a turbojet engine mounted thereon which was owned by GECC.

Pursuant to the Federal Tort Claims Act plaintiffs' claims against the United States were tried to the court while, simultaneously, the plaintiffs' claims against the other defendants were tried to the jury. At the conclusion of plaintiffs' case the district judge entered the following orders which are the subject matter of this appeal: the court granted the Government's motion to dismiss under Rule 4(b) of the Federal Rules of Civil Procedure on the ground that Allegheny was contributorily negligent; on the basis of the court's determination that Allegheny was contributorily negligent, the court applied the doctrine of collateral estoppel to preclude Allegheny from continuing further against the defendants Forth and the estate of Carey; the trial judge granted a directed verdict in favor of Brookside; and dismissed GECC as a party plaintiff on the ground that it was not the real party in interest.

On appeal plaintiffs raise various issues, the most important of which are: (1) whether the district court's findings of fact and conclusions of law that Allegheny was contributorily negligent and thus barred from recovery are supported by substantial evidence and in accord with applicable law, and are not clearly erroneous; (2) whether the trial judge erred in dismissing GECC on the ground that it was not the real party in interest; (3) the propriety of the district court's grant of summary judgment to Forth and the estate of Carey on the ground that Allegheny was collaterally estopped; (4) whether the trial judge erred in entering a directed verdict in favor of Brookside. Plaintiffs also challenge as reversible error certain other rulings of the trial judge which they contend must be corrected in the event a new trial is granted. We reverse and remand for a new trial as to plaintiffs' claims against the United States, Forth, and the estate of Carey but affirm with respect to the defendant Brookside.

I

The mid-air collision between Allegheny's aircraft, Allegheny Airlines Flight 853 (Flight 853), and the Piper

Cherokee aircraft operated by Robert W. Carey occurred at approximately 3:29 p.m. on September 9, 1969 in the airspace northwest of Fairland, Indiana. At the time of the collision Carey, as a student pilot, was engaging in a solo cross-country flight as part of his training for a private pilot's license. The airplane he was operating was owned by Forth Corporation which among other things operated Brookside Airpark and sold, rented, and serviced aircraft as well as provided ground and flight instruction to student pilots such as Carey. Carey had departed from Brookside Airpark, located northwest of Indianapolis, and was heading in a southernly direction, intending to fly to Bakalar Air Force Base located southeast of Indianapolis at Columbus, Indiana. Since Carey possessed only a student pilot's license all his flying was required to be performed in accordance with visual flight rules (VFR) requirements, the most important of which, for purposes of the instant action, was that Carey was prohibited from operating his aircraft closer than 500 feet from the base of any clouds. 14 C.F.R. § 91.105 (1968).

Allegheny Flight 853 departed from Cincinnati, Ohio en route to Indianapolis' Weir Cook Airport at 3:16 p.m. Flight 853 was under an instrument flight rules (IFR) clearance and consequently was operating under the jurisdiction of and in communication with the Indianapolis Air Traffic Control Center. Air traffic controller Masen Grant directed Flight 853 to proceed to Shelbyville, Indiana and then on to Indianapolis at an altitude of 10,000 feet mean sea level (MSL). At approximately 3:23 p.m. controller Grant advised Flight 853 that it was in radar contact and directed it to descend to 6,000 feet. Thereafter, since the aircraft was going to land at Indianapolis, controller Grant was required to terminate his jurisdiction over Flight 853 and transfer air traffic control jurisdiction to the Indianapolis Approach Control facility, the Federal Aviation Agency facility that had jurisdiction for landings at Weir Cook Airport. Grant effected a radar handoff of Flight 853 to Merrill T. McCammack, the arrival radar approach controller at Weir Cook.

At 3:27 p.m. Flight 853 contacted controller McCammack and reported that it was in the process of descending

to 6,000 feet. Approximately twelve seconds later, McCammack responded by requesting the aircraft to identify itself by use of its transponder to enhance its radar signal. McCammack then directed Flight 853 to fly a heading of 280 degrees and to descend to 2500 feet. Allegheny Flight 853 acknowledged these instructions at approximately 3:27.29 p.m.; this was the last known or recorded transmission of Flight 853.

Subsequent to Allegheny's 3:27.29 p.m. confirmation of instructions, McCammack allegedly watched the aircraft turn to 280 degrees on his radar, scanned his radar to determine if there was any other traffic in the area, and, observing none, he admittedly turned his attention from the radar screen to perform certain routine administrative functions which he described as follows:

> "I was observing the target, checking the area in front of the aircraft and to either side to see if there were any aircraft that would be traffic for the flight that I was controlling. I observed no traffic for the aircraft, so then at approximately the time of twenty-nine I looked at the flight progress strip and noticed that I had not marked down the radar handoff time. I looked at the clock and it was approximately twenty-nine and I wrote this time down on the strip. I then coordinated with the departure controller to see if there was any other traffic that he might have that would be a factor for the IFR separation of Allegheny 853, would be following anyone that they might be working that would be landing in Indianapolis ahead of Flight 853. I also checked the weather sequence to make sure that the weather was still the same, checked the wind indicators to see what the wind was presently reading, and I also checked the altimeter to see that the information that the pilot had received was current. After doing these coordinating duties, I looked back to the radar scope and noticed that the target on Allegheny 853 was no longer visible."

While his attention was allegedly diverted, the mid-air

collision occurred at 3:29.13 p.m. and the radar target return for Flight 853 disappeared within seconds thereafter.

McCammack did not observe the collision nor the disappearance of Flight 853 on his radar scope. Nor, did he at any time advise Flight 853 of the presence of the Piper Cherokee aircraft.

The collision occurred at an altitude of approximately 3600 feet MSL with the Piper Cherokee striking Flight 853 from the right at an angle of 106 degrees. Both aircraft crashed to the ground with the wreckage strewn over a site approximately twenty nautical miles southeast of Weir Cook Airport. There were no survivors of the collision.

II

In assessing the propriety of the district court's findings as to Allegheny's asserted contributory negligence, we note that the proper standard for review of such findings is whether they are clearly erroneous and not supported by substantial evidence.[3] The findings of the district court which led to its holding of contributory negligence are:

---

[3] The district court entered judgment for the United States pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, which provides in relevant part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, court shall make findings as provided in Rule 52(a).

It is provided in Rule 52(a) that:

> (a) Effect. In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

"[1.] The collision occurred . . . five hundred feet (500′) or more below the base of the clouds.

"[2.] Allegheny . . . failed to exercise ordinary care . . . under the circumstances in that plaintiff's aircraft was operated by its crew who failed to maintain a lookout for the Piper Cherokee 140 aircraft. . . .

"[3.] Allegheny . . . failed to exercise ordinary care . . . under all circumstances . . . in that its crew conducted the aircraft descent from cruise altitude in an improper manner in that the rate of descent was in excess of five hundred feet (500′) per minute. . . .

"[4.] Allegheny . . . failed to exercise ordinary care . . . under all the circumstances . . . in that its crew conducted the aircraft descent from cruise altitude at a descent rate which was excessive under the circumstances through clouds and which did not permit the plaintiff's aircraft to be slowed to the required rate of descent of five hundred feet (500′) per minute at one thousand feet (1000′) above the assigned altitude of two thousand five hundred feet (2500′). . . .

"[5.] Allegheny . . . failed to exercise ordinary care . . . under all the circumstances . . . in that its crew failed to cause the plaintiff's aircraft to give way to the Piper Cherokee 140 aircraft which was converging from the right of plaintiff's aircraft."

Based upon the foregoing findings the district court concluded that Allegheny violated common law and statutory duties of care which were a proximate cause of its injuries. As the following analysis will demonstrate, we are of the view that the district court's findings were clearly erroneous and not supported by substantial evidence.

The critical inquiry in resolving the question of Allegheny's contributory negligence is the distance below the clouds at which the Piper Cherokee aircraft was operating at the time of the collision. Resolution of the other issues as to rate of descent, duty to maintain lookout, and yield

right of way are dependent upon the distance that the Cherokee was flying below the clouds. That is, Allegheny's liability for contributory negligence was directly related to its pilot's ability to see the other aircraft, assess the situation, and take any necessary evasive action to avoid collision.

The district judge made no specific findings as to the altitude of the cloud formations or the altitude of the collision. However, he did enter the general finding that the collision occurred five hundred feet below the base of the clouds. The evidence appears certain, and the parties are agreed, that the collision altitude was approximately 3600 feet MSL. Inferentially therefore, the district judge found that the altitude of the clouds at the collision site was at a minimum of 4100 feet MSL. Without belaboring the point,[4] Allegheny has produced an abundance of evidence to the effect that the altitude of the clouds at the collision site ranged between 3000 to 3900 feet MSL. Allegheny's evidence is persuasive that the Piper Cherokee aircraft piloted by Carey was closer to the clouds than the required distance of 500 feet and that the collision occurred less than 500 feet below the clouds if indeed it did not in fact occur in the clouds. Defendants urge that even in the face of this evidence, which is highly supportive of Allegheny's contention, the district court's finding was proper in view of the following evidence: A weather observation taken at Weir Cook Airport eleven minutes after the collision which placed the base of the clouds above the Indianapolis airport at 4197 feet MSL; the testimony of Allegheny's witnesses Robert F. Johannesen and Charles Bradley was to the effect that there was a layer of clouds extending at uniform height from Weir Cook Airport to the site of the accident. Although Johannesen and Bradley both testified to the uniformity of

[4] Without recounting the testimony of the numerous witnesses and experts produced by plaintiffs, we only note that there was substantial evidence favorable to plaintiffs as to the altitude of the clouds. In addition, we agree with plaintiffs that the trial court erroneously excluded from the evidence the stipulated interphone conversations between the Indianapolis Approach Control facility and the Bakalar Tower relating to the weather conditions at Bakalar.

the cloud base they also testified that the cloud base was between 3500 to 3900 feet MSL. Moreover, Johannesen's observation about the uniformity of the cloud base was made thirty to forty minutes before the accident while Bradley's was made thirty to forty minutes after the collision. The 4197 foot cloud base measured at Weir Cook Airport eleven minutes after the accident was part of a weather formation drifting southeasternly toward the accident site which was some twenty nautical miles away and as such was part of a clearing in the weather coming from the northwest, while the worst weather was to the southeast at Bakalar. In our judgment the evidence emphasized by defendants cannot reasonably support the inference that at the time and place of the accident, twenty nautical miles southeast of Weir Cook Airport and eleven minutes before the weather observation at Weir Cook, the clouds above the accident site were at 4197 feet MSL. We do not think this evidence is of such persuasion as to avoid a determination that the court's finding was clearly erroneous.

Having overturned the district court's implicit finding as to the altitude of the clouds, we necessarily must set aside the court's findings as to Allegheny's duty to maintain a lookout and duty to yield right of way. We do so in light of the fact that an integral element to determining a breach of duty of lookout or failure to yield right of way is whether the Allegheny crew could have seen the Piper Cherokee in a reasonable time to avoid the collision. Most assuredly, if the Piper Cherokee was flying in the clouds at the time of the collision, so that little opportunity existed for Allegheny to see the other aircraft, defendants would be hard pressed to prevail on their affirmative defenses of failure to maintain lookout and yield right of way. Accordingly, findings on these issues are directly dependent on ascertaining the distance between the collision and the base of the clouds.

We must also set aside the district court's findings with respect to Allegheny's rate of descent through the clouds for these findings are likewise controlled by, albeit indirectly, the finding of the altitude of the clouds at the time of the collision and the Piper Cherokee's distance there-

from. Even assuming that Allegheny's rate of descent was excessive under the circumstances, it might be established at a full trial that the Cherokee Piper was flying so near to the base of the clouds that, even if the Allegheny pilot had descended at a lesser and more appropriate rate, he would, nevertheless not have had a reasonable time to see and react to the presence of the Cherokee Piper. Stated otherwise, based on findings of the altitude of the collision and cloud base, it might be established that Allegheny's alleged excessive rate of descent was not the proximate cause of its injuries.

In addition, we set aside, on an independent ground, the district court's finding as to the allegedly negligent nature of Allegheny's descent. There is no evidence in the record that substantiates the finding that Allegheny engaged in an excessive rate of descent. Indeed, the court's holding is contrary to the stipulation of the parties,[5] the uncontradicted testimony as to the custom and practice in the aviation industry,[6] and is contrary to the descent rate procedures recommended by the Federal Aviation Administration. Moreover, we agree with Allegheny that in determining whether the descent rate was excessive under the circumstances, it may appropriately be considered that Allegheny had a right to rely on controller McCammack

---

[5] The parties entered into the following stipulation:

"It is hereby stipulated and agreed by and between the parties that the rule of conduct in the aviation industry as of September 9, 1969, was as follows:

"1. During any phase of flight, pilots are required to adhere to the following procedures whenever cleared by ATC to descend or climb to an altitude or flight level.

"'If an altitude change of more than one thousand feet is required, descend or climb as rapidly as practicable to one thousand feet above or below the assigned altitude and then attempt to descend or climb at a rate of five hundred feet per minute until the assigned altitude is reached.'"

[6] With respect to the custom and practice of the industry, it was error for the trial judge to exclude the testimony of American Airlines Captain Robert F. Johannesen as to the appropriate rate of descent. Johannesen's testimony as to the appropriate descent rate was highly relevant in that he had flown an American Airlines aircraft in the same area shortly before the accident with the same clearance.

properly performing his duties and advising the Allegheny crew of the presence of any small aircraft in their path. Likewise, an assessment of Allegheny's rate of descent must take into consideration that the Allegheny pilot need not have anticipated that the Piper Cherokee was being operated less than 500 feet from the base of the clouds in violation of VFR regulations.

Accordingly, for the foregoing reasons we hold that the district court erred in granting the Rule 41(b) motion to dismiss, entered in favor of the United States. In so doing we must also hold as erroneous the grants of summary judgment entered in favor of Forth and the estate of Carey on the basis of collateral estoppel.[7]

III

The district court, on defendants' motion, dismissed GECC as a party plaintiff on the basis that it was not a real party in interest. GECC was the owner of one of the

---

[7] Although we need not directly pass on the propriety of the district court's action in implementing the doctrine of collateral estoppel, we are impelled to say that we strongly disapprove of the procedure utilized. We recognize the oddity of the instant litigation—a simultaneous trial of two actions involving the same facts and issues whereas the judge is trier of fact as to one defendant (the United States) while the jury is the trier of fact as to the remaining defendants. By entering a judgment on the merits for the Government and then applying the doctrine of collateral estoppel to preclude further action against the remaining defendants, the trial judge substituted his findings for those which should have properly been determined by the jury. Such a procedure, although otherwise proper in form, in substance short circuits plaintiffs' right to a trial by jury in an action where the evidence is such that it would be most inappropriate to fail to submit the case to the jury by entering a directed verdict. In such circumstances plaintiffs' right to trial by jury is rendered meaningless. Consequently, we are of the view that the application of the doctrine of collateral estoppel was improper in light of the peculiarities of this case. *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970), The Government's case could be properly decided by the judge while at the same time plaintiffs' case against the remaining defendants should be submitted to the jury. Moreover, in an effort to avoid inconsistency in verdicts the better practice might be to submit plaintiffs' case to the jury which would function in two capacities: (1) it would render a verdict as to those defendants other than the Government, and (2) it would act as an advisory jury with respect to plaintiffs' case against the Government pursuant to the Federal Tort Claims Act.

engines mounted on the Allegheny aircraft destroyed in the collision which it leased to Allegheny. As part of that leasing arrangement it was agreed that in the event of loss, GECC could demand a replacement engine from Allegheny. Pursuant to that provision, GECC did in fact receive a replacement engine from Allegheny. To the extent GECC received insurance proceeds due to the destruction of its engine, Allegheny and GECC entered into an agreement whereby GECC agreed to deposit the insurance proceeds in an escrow account pending delivery of the replacement engine.

The defendants in effect contend that since GECC obtained a replacement engine from Allegheny, GECC sustained no loss and was not therefore the real party in interest. Defendants' argument runs contrary to the collateral source rule which provides that compensation for loss which is received by a plaintiff from a collateral source independent of the wrongdoer cannot be utilized by the wrongdoer in mitigation of damages. *See e.g., Powers* v. *Ellis,* 231 Ind. 273, 108 N.E.2d 132, 135 (1952); *Mason-Rust* v. *Laborers' International Union, Local 42,* 435 F.2d 939, 945 (8th Cir. 1970).

The lease agreement between Allegheny and GECC was designed for the protection of GECC and not intended as a financial outlet for tortfeasors responsible for the loss. The purpose of the lease agreement is consonant with the purpose of the collateral source rule which is to prevent a defendant tortfeasor from taking advantage of efforts made by a plaintiff to protect himself from loss. Moreover, the collateral source rule rests on the premise that the tortfeasor is not to be punished twice for the identical, singular wrong. In view of the allegations of the complaint, made jointly by Allegheny and GECC, defendants would not be subject to future or multiple claims for loss of the engine. Accordingly, we hold that GECC was a real party in interest and that it was error for the district court to dismiss it from the action as party plaintiff.

IV

Plaintiffs challenge the propriety of the district court's grant of a directed verdict in favor of Brookside Corpora-

tion, the parent and one hundred percent stock owner of Forth Corporation. Plaintiffs urge that Brookside had so dominated and controlled Forth that the latter had become an instrumentality of Brookside. Plaintiffs therefore contend that Brookside was properly charged with liability for the alleged torts of its subsidiary corporation. In our judgment the evidence, when viewed in the light most favorable to plaintiffs, is supportive of but one inference, namely, Forth Corporation was not a mere instrumentality of Brookside.

As we have indicated in our opinion in *Stevens* v. *Roscoe Turner,* 324 F.2d 157 (7th Cir. 1963) a "parent corporation will be responsible for the obligations of its subsidiary when . . . the subsidiary has become its mere instrumentality.' " 324 F.2d at 160. In establishing the fact that a subsidiary is a mere instrumentality of its parent, we stated that the following elements must be proved: (1) control by the parent to such a degree that the subsidiary has become its mere instrumentality; (2) fraud or wrong by the parent through its subsidiary; and (3) an unjust loss or injury to the claimant. 324 F.2d at 160. We need not reach elements two and three for plaintiffs' case fails on the first element.

In ascertaining whether the requisite degree of control by the parent corporation is present so as to warrant a finding favorable to plaintiffs on the first element, we have considered the evidence as it relates to the presence or absence of the following factors:

> "(a) The parent corporation owns all or most of the capital stock of the subsidiary.
>
> "(b) The parent and subsidiary corporations have common directors or officers.
>
> "(c) The parent corporation finances the subsidiary.
>
> "(d) The parent corporation subscribes to all the capital stock of the subsidary or otherwise causes its corporation.
>
> "(e) The subsidiary has grossly inadequate capital.

"(f) The parent corporation pays the salaries and other expenses or losses of the subsidary.

"(g) The subsidary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

"(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

"(i) The parent corporation uses the property of the subsidiary as its own.

"(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

"(k) The formal legal requirements of the subsidiary are not observed." 324 F.2d at 161.

The evidence demonstrates among other things that Forth was adequately capitalized and was engaged in business entirely dissimilar and disassociated with that of its parent (Brookside manufactured industrial fans); there was general adherence to the corporate formalties; Brookside's business with Forth amounted to only one percent of Forth's total business. There is no compelling evidence that Forth as a corporate entity had been reduced to a mere instrument of the parent. Indeed the evidence reflects that at the time of the collision Forth was, although a young organization, a viable independent corporation. To the extent control was exercised by the parent corporation, it was in our judgment no more than what might be expected as necessary for the proper protection of an investment. Accordingly, we affirm the district court's grant of a directed verdict in favor of Brookside.

V

Plaintiffs challenge as erroneous the following rulings by the trial judge: (1) the district court directed a verdict in favor of Forth on plaintiffs' specification of negligence

that Forth was responsible for the negligent acts of Robert W. Carey by reason of the fact that Carey and Forth were engaged in a joint enterprise; (2) the district court struck from plaintiffs' complaint various allegations of negligence which asserted that Forth was responsible for the negligent acts of Carey pursuant to Burns' Indiana Statutes, §§ 14-901, 14-106 and 14-109; (3) the district court directed a verdict in favor of Carey's estate on plaintiffs' specification of negligence that Carey failed to properly plan his flight in that the planned route crossed the descent area utilized by the IFR aircraft landing at Weir Cook Airport; and (4) the district court directed a verdict in favor of Forth on plaintiffs' specification of negligence that Forth improperly trained Carey.

With respect to plaintiffs' claim that Carey and Forth were engaging in a joint enterprise, we are of the opinion that plaintiffs had made out a prima facie case warranting submission to the jury. The essential elements of a joint enterprise are: (1) A community of interest in the object and purpose of the undertaking; (2) an equal right to direct and govern the conduct of the other participant in respect thereto; and (3) a contract, either express or implied, to that effect. *Jones* v. *Hernandez*, 263 N.E. 2d 759, 763 (Ind. 1970). The evidence establishes that Forth and Carey had undertaken a joint enterprise with the objective of obtaining Carey's private pilot's license and that the specific flight resulting in the mid-air collision involved the joint efforts of both in furtherance of their common goal. As to the "community of interest in the object or purpose" requirement, both Carey and Forth were seeking the common objective of obtaining a private pilot's license for Carey. Carey's interest was obvious, his personal convenience and to satisfy his desire to learn to fly. Forth's interest in Carey's success was reflected in the additional business to be derived from Carey as a pilot and other potential pilots who might be drawn to Brookside for training. More important, however, was the fact that Forth's existence as a flight school depended in part on the success of Carey and other student pilots like him in obtaining their private pilot's license on their first attempt. See 14 C.F.R. § 141.11(a)(1). With regard to the second requirement that there be "an equal right to direct

and govern the conduct of the other," Carey had control over the goal of obtaining his private pilot's license in that he alone had the power to determine his rate of progress by the frequency and timing of his flying. Forth had control over Carey which emanated from the instructor-student relationship. In addition, Forth was under an affirmative obligation under the federal air regulations to supervise and control all facets of Carey's training. Moreover, in view of the hazardous nature of Carey's undertaking and his status as a student pilot, we reject any notion which urges that equal control can be established only by a showing of joint presence of the parties at the time of the alleged wrongdoing. Both Carey and Forth had equal control over the attainment of the common objective of securing Carey's private pilot license. The last element of a joint enterprise, "a contract, express or implied" is sufficiently established on the basis of the actions of the parties as well as the express agreements entered into between Forth and Carey.

Addressing plaintiffs' second contention of trial court error we agree that it was improper for the district judge to strike those allegations of plaintiffs' complaint charging Forth with the legal responsibility of Carey's alleged negligence pursuant to Burns' Indiana Statutes §§ 14-901, 14-106 and 14-109. A fair reading of sections 14-901(h) and 1-109[8] charges the absentee owner with the responsibility for the careless and reckless operation of his aircraft by another. While no Indiana cases have interpreted these sections, we note that virtually identical sections in aero-

---

[8] It is provided in section 14-901(h):

"(h) Operation of aircraft or operate aircraft—the use of aircraft for the purpose of air navigation, and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this state."

Section 14-109 states that:

"• • • It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water in a careless or reckless manner so as to endanger the life or property of another; or to operate an aircraft in the air, or on the ground or water with reckless disregard for the safety, property, or rights of others. • • • In any proceeding

nautical statutes of other states have been interpreted to impose liability upon the absentee owner. *Hays* v. *Morgan*, 221 F.2d 481 (5th Cir. 1955); *Lamasters* v. *Snodgrass*, 248 Iowa 1377, 85 N.W.2d 622 (1957); *Hoebee* v. *Howe*, 98 N.H. 168, 97 A.2d 223 (1952). We find the foregoing decisions persuasive and agree with plaintiffs that if the Indiana courts had occasion to confront this issue, they would properly interpret sections 14-901(h) and 14-109 as holding the absentee owner financially responsible for the negligent acts of a student pilot to whom he had granted the use of his aircraft. *Ross* v. *Apple*, 240 N.E.2d 825, rehearing denied 241 N.E.2d 872 (Ind. App. 1968).[9]

Lastly, we treat together plaintiffs' challenges to the directed verdicts granted in favor of the estate of Carey and Forth which dealt with certain of plaintiffs' specifications of negligence. Plaintiffs had contended Carey was negligent in planning his flight through the descent area utilized by IFR aircraft landing at Weir Cook Airport. They also claimed that Forth improperly instructed Carey as to various pertinent aspects of flying. On the evidence before us these matters should have been submitted to the jury for determination and not disposed of by way of a directed verdict.

The judgment in favor of Brookside Corporation is affirmed.

The judgments in favor of the remaining defendants are reversed and the causes are remanded for a new trial under the provisions of Circuit Rule 23.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

---

charging careless or reckless operation of aircraft in violation of this section, the court in determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics."

[9] Pursuant to Burns' Indiana Statute § 14-106 plaintiffs have presented facts sufficient to make out a case of negligent entrustment by Forth. Accordingly, this is a matter which should properly be submitted to the jury.

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit
Chicago, Illinois 60604
NOVEMBER 26, 1974

Before SWYGERT, *Chief Judge;* FAIRCHILD, CUMMINGS, PELL, STEVENS, SPRECHER, TONE, *Circuit Judges,* and HOFFMAN, *Senior District Judge.*

ALLEGHENY AIRLINES, INC. AND GECC LEASING CORPORATION, *Plaintiffs-Appellants,* No. 73-1273 v. UNITED STATES OF AMERICA, FORTH CORPORATION, ET AL., *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. (IP 70 C 609)

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny a rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the suggestion that it be heard en banc be, and the same are hereby, DENIED.

Judges Stevens and Tone voted to grant said petition for rehearing *en banc.*

APPENDIX C

§ 1301. Definitions

As used in this chapter, unless the context otherwise requires—

(26) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

8-21-3-1 [14-901]. Aircraft Financial Responsibility Act—Definitions.—(1) The following words and phrases when used in this act [8-21-3-1—8-21-3-23] shall, for the purpose of this act, unless a different meaning appears from the context, have the following meanings:

(h) Operation of aircraft or operate aircraft—the use of aircraft for the purpose of air navigation, and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of the statutes of this state.

8-21-4-5 [14-106]. Collision of aircraft—Tort liability.—The liability of the owner of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land. [Acts 1927, ch. 43, § 6, p. 119.]

8-21-4-6 [14-107]. Jurisdiction over crimes and torts.—All crimes, torts and other wrongs committed by or against an aeronaut or passenger while in flight over this state shall be governed by the laws of this state; and the

question whether damage occasioned by or to an aircraft while in flight over this state constitute a tort, crime or other wrong by or against the owner of such aircraft, shall be determined by the laws of this state. [Acts 1927, ch. 43, § 7, p. 119.]

8-21-4-8 [14-109]. Dangerous operation of aircraft—Operation unlawful while intoxicated or under influence of drugs—Dropping articles or creating hazards—Penalty.—It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water in a careless or reckless manner so as to endanger the life or property of another; or to operate an aircraft in the air, or on the ground or water with reckless disregard for the safety, property, or rights of others. This shall include but not be limited to any trick or acrobatic flying or unnecessary low flying over any thickly inhabited area or public gathering within the state. In any proceeding charging careless or reckless operation of aircraft in violation of this section, the court in determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics. It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water while under the influence of intoxicating liquor, narcotics, or other habit-forming drugs. It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water who has been diagnosed by a physician as having an active case of epilepsy or similar disorders characterized by lapses of consciousness, or is under the influence of any drug, or medicine for treatment of such disorder which may bring about lapses of consciousness. It shall further be unlawful for any person piloting an aircraft or for any person who shall be a passenger of an aircraft to drop anything from an aircraft in flight which may create any hazard to persons or property. It shall be unlawful for any person to operate an aircraft in the air or on the ground or water or over an open air assemblage of persons, city or town, in such a manner as to cause or bring about an unreasonable disturbance or breach of the peace. Any person found to

be in violation of any part of this section shall be guilty of a misdemeanor and punishable by a fine of not more than two hundred fifty dollars [$250] or imprisonment for not more than six [6] months, or both. [Acts 1927, ch. 43, § 9, p. 119; 1947, ch. 42, § 1, p. 124; 1951, ch. 39, § 1, p. 95.]

APPENDIX D

• • (Caption—IP 70-C-609) • •

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

The plaintiff, Allegheny Airlines, Inc., as such common carrier by air was operating such aircraft at all times in question on a route which included a regularly scheduled flight from the Greater Cincinnati Airport situated near the City of Covington, State of Kentucky, to Weir Cook Airport situated in the westerly part of the City of Indianapolis, where the United States of America operated certain facilities. When the common carrier's aircraft reached a point over Shelby County, State of Indiana, it was descending in preparation for a landing at Weir Cook Airport and was heading in a generally westerly direction when there was a mid-air collision between it and a Piper Cherokee 140 aircraft owned by Forth Corporation and it was leased to and operated by Robert W. Carey, a student pilot of Forth Corporation, in a cross country flight that was generally in a southerly direction from Brookside Airport to Bakalar Airport. The collision occurred in the afternoon five hundred feet (500′) or more below the base of the clouds. The vertical segment of the tail structure collided with the Piper Cherokee 140 aircraft at a point at the juncture of the left wing and the fuselage of the Piper Cherokee 140 aircraft.

Allegheny Airlines, Inc. by and through its employees acting in the course and scope of their employment failed to exercise ordinary care of a common carrier by air under all of the circumstances in that plaintiff's aircraft was operated by its crew who failed to maintain a lookout for the Piper Cherokee 140 aircraft; in that its crew conducted the aircraft descent from cruise altitude in an improper manner in that the rate of descent was in excess of five hundred feet (500′) per minute; in that its crew conducted the aircraft descent from cruise altitude

at a descent rate which was excessive under the circumstances through clouds and which did not permit the plaintiff's aircraft to be slowed to the required rate of descent of five hundred feet (500′) per minute at one thousand feet (1000′) about the assigned altitude of two thousand five hundred feet (2500′); and in that its crew failed to cause the plaintiff's aircraft to give way to the Piper Cherokee 140 aircraft which was converging from the right of plaintiff's aircraft.

The conduct of Allegheny Airlines, Inc. was a proximate contributing cause of the mid-air collision and the resulting losses.

The Court has jurisdiction of the parties and subject matter of the action under Title 28 U.S.C. Section 1346(b).

The defendant, United States of America, has proved all of the essential elements and the alleged facts of each element of its second defense of answer to the complaint by the preponderance of the evidence. The plaintiff, Allegheny Airlines, Inc., was guilty of negligence in the operation of its plane which was a contributing proximate cause of the mid-air collision. In operating the plaintiff's aircraft as found, Allegheny Airlines, Inc. violated certain common law and statutory duties. When Allegheny Airlines, Inc. failed to maintain a lookout as found, it violated a common law duty and a duty prescribed by Title 14 C. F. R. Section 91.67(a). When Allegheny Airlines, Inc. conducted the descent of its aircraft at such a rate of descent as found, it violated a common law duty. When Allegheny Airlines, Inc. failed to give the right of way to the Piper Cherokee 140 aircraft as found, it violated a common law duty and a duty prescribed by Title 14 C. F. R. Section 91.67(a)(c).

The law is with the defendant, United States of America, and against the plaintiffs and the defendant is entitled to a Dismissal of the action.

Dated this 29th day of November, 1972.

/s/ Cale J. Holder
Cale J. Holder
Judge, United States District Court,
Southern District of Indiana

APPENDIX E

NAME	MINUTES BEFORE	MINUTES AFTER	LOCATION OF OBSERVATION	IN AIR/ GROUND	TIME G.M.T.	HEIGHT OF CLOUDS OBSERVED	RECORD REFERENCE	REMARKS
Mr. R. F. Johannesen Pilot American A.L.	34		Flew nearly over site to land at Weir Cook	Air	1855	3500 feet mean sea level	T. 3064-6	made as proceeding to land at Weir Cook
Mr. F. Bellamy Weather Observer	31		Bakalar Air Base Columbus, Indiana	Ground	1858	3156 feet mean sea level	T. 495	visual estimate made about 20 miles from crash site
Mr. C. King Private Pilot	18		Flew within a few miles of crash site	Air	1911	3500 feet mean sea level	T. 3294 3298 3301 3302-4	visual estimate
	CRASH							
Mr. Roy Whitehead Private Pilot		9	Flew within a few miles of crash site	Air	1938	3000 feet mean sea level	T. 3264-7	visual estimate
Mr. McColly Weather Observer		11	Indianapolis Weir Cook Airport	Ground	1940	4197 feet mean sea level	T. 430 454-6	measured ceiling, height with ceilometer about 25 miles from crash site

NAME	MINUTES BEFORE	MINUTES AFTER	LOCATION OF OBSERVATION	IN AIR/ GROUND	TIME G.M.T.	HEIGHT OF CLOUDS OBSERVED	RECORD REFERENCE	REMARKS
Mr. Frank Griffith Weather Observer		28	Bakalar Air Base Columbus, Indiana	Ground	1957	3456 feet mean sea level	T. 514-6	visual estimate made about 20 miles from crash site
Mr. Schweibold Helicoptor Pilot		41	Flew over crash site	Air	2010	31-3300 feet mean sea level	T. 3355-8 3359-61	flow to estimated 500 feet of cloud base
Ms. P. Haupt Private Pilot		41	Flew over crash site	Air	2010	3000-3500 feet mean sea level	T. 3384 3389	visual estimate in same plane with Bradley
Mr. C. Bradley Private Pilot		41	Flew over crash site	Air	2010	3600-3900 feet mean sea level	T. 3419-3425	visual estimate in same plane with Haupt
Mr. Frank Griffith Weather Observer		87	Bakalar Air Base Columbus, Indiana	Ground	2057	3256 feet mean sea level	T. 516-7	visual estimate made about 20 miles from crash site
Mr. C. Gossett Expert Weather Witness			None			3700 feet mean sea level (opinion)	T. 3470-71	expert opinion based on weather data available

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ALLEGHENY AIRLINES, INC., AND
G.E.C.C. LEASING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 504 F.2d 104. The findings and conclusions of the district court are unreported.[1]

---

[1]Review of the court of appeals judgment is also being sought by Forth Corporation, *et al.* in No. 74-1059. Since that petition for certiorari contains the opinion of the court of appeals and its denial of the petition for rehearing (Apps. A and B) and the findings and conclusions of the district court (App. D), we have not reprinted them herein.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1974. A timely petition for rehearing was denied on November 26, 1974. On February 19, 1975, Mr. Justice Rehnquist extended the time for filing this petition to March 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals improperly undertook the fact-finding function of the district court in violation of Rule 52(a), Fed. R. Civ. P., when, in the face of abundant record evidence substantiating the district court's factual finding that the pilot and crew of an Allegheny Airlines jet aircraft were contributorily negligent, it rejected that finding as clearly erroneous.

STATEMENT

This case arises out of a mid-air collision on September 9, 1969, in the airspace over Fairland, Indiana, 20 miles from Indianapolis, between a commercial plane operated by Allegheny Airlines ("Allegheny") and a Piper Cherokee aircraft operated by pilot Robert W. Carey and owned by the Forth Corporation. All occupants of both aircraft were killed. Suits by representatives of the passengers and crew of the Allegheny jet were settled pursuant to an agreement between Allegheny and the United States whereby Allegheny agreed to pay two-thirds, and the United States one-third, of all settlements or judgments.[2]

---

[2]These suits had been transferred (with the instant property damage one) by the Judicial Panel on Multidistrict Litigation to the Southern District of Indiana and assigned to Judge Holder for supervision of pre-trial discovery. *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621. After discovery was completed, the district court issued orders pursuant to 28 U.S.C. 1404 transferring all cases to the Southern District of Indiana and consolidating them for trial.

Allegheny and the United States then settled the passenger and crew suits, and sued for indemnification from the private plane interests (Forth Corporation, *et al.*). The district court's dismissal of this action was reversed by the court of appeals. That reversal is the subject of Forth, *et al.*'s petition for certiorari in No. 74-1060, in which the United States is acquiescing.

This case involves Allegheny's[3] attempt to recover damages for loss of its aircraft from the United States and the owners and operators of the private plane.

Allegheny alleged that the federal air traffic controller's negligence and the negligent operation of the private plane caused the accident, while the defendants maintained that the contributory negligence of the Allegheny crew was the proximate cause of the accident. Allegheny's claims against the government were tried under the Federal Tort Claims Act without a jury (see 28 U.S.C. 2402); claims against the private defendants were tried simultaneously to a jury.

At the close of Allegheny's case, after six weeks of trial, the evidence showed that there was a cloud cover at the time of the accident, and that the student pilot of the private plane was required by his license and federal regulations to fly at least 500 feet from the base of the clouds. If he was doing so, the Allegheny plane should have seen and avoided him; but if the private plane was less than 500 feet from the base of the clouds, the Allegheny plane would not have had sufficient time after it descended from the clouds to avoid the private plane. It was undisputed that the collision occurred at 3,600 feet above sea level. The question at issue was thus the height of the base of the clouds at the time and place of the accident.

---

[3]G.E.C.C. Leasing Corp., claiming it owned one of the plane's engines, also sued as a party plaintiff. The district court dismissed G.E.C.C. as a party plaintiff on the ground that it was not a real party in interest, since the engine was simply security for a loan. The "lease" agreement provided that if the engine were destroyed, Allegheny would "replace" it. The "replacement" can be made by substituting the serial number of another engine in this "lease" agreement. The court of appeals reversed, holding that G.E.C.C. was a proper party plaintiff (Pet. No. 74-1059, App. 10A-11A).

The evidence on this issue was conflicting. A concededly accurate instrument measurement taken 11 minutes after the accident at Indianapolis showed a uniform cloud height of 4,197 feet above sea level, *i.e.*, almost 600 feet above the point of collision. Three of Allegheny's witnesses[4] testified that the cloud layer was at a uniform height from the site of the instrument reading to the site of the collision. One of these witnesses, Bradley, made his observations contemporaneously with the accident.[5] On the other hand, several witnesses, including the three who testified concerning the uniformity of the cloud layer, estimated the cloud height at or near the accident at levels ranging from 3,000 feet to 3,900 feet.[6]

---

[4]Two pilots and a weather expert.

[5]Bradley testified (by deposition, as he had died before trial) that he was on final approach to land at Indianapolis when he was requested to search for the DC-9 at "about 3:30 or 3:35 on that afternoon" (Tr. 3415). This was almost immediately after the collision, which took place at 3:29. He testified that he reached the accident site within 15 minutes (Tr. 3416). Bradley testified that from the time he was making his approach to Indianapolis, until after he was over the accident site, and even to the time when he returned and landed at Indianapolis, the cloud conditions were the same throughout (Tr. 3430). He testified that the cloud base was well defined (Tr. 3427), and that the condition throughout the afternoon was the same at the crash site and at Indianapolis (Tr. 3419-3420). In light of this evidence, the weather conditions at another airport, Bakalar, which the court of appeals indicated was improperly excluded (Pet. No. 70-1059, App. 7A n. 4), was irrelevant.

[6]The weather expert based his estimate of 3,700 feet on an analysis of weather records, but did not take the instrument reading into account (Tr. 3470, 3486-3488). The other estimates were based simply on the recollected observations of those in the area at or near the time of the accident.

At the close of Allegheny's case, the government moved for dismissal pursuant to Rule 41(b), Fed. R. Civ. P.,[7] contending that the weight of the cloud height evidence showed that the clouds were over 4,100 feet, and thus that the private plane was flying properly at least 500 feet below them. As trier of fact in the Tort Claims Act suit, the district court agreed. It found that "[t]he defendant, United States of America, has proved all of the essential elements and the alleged facts of each element of its second defense of answer to the complaint by the preponderance of the evidence. The plaintiff, Allegheny Airlines, Inc., was guilty of negligence in the operation of its plane which was a contributing proximate cause of the mid-air collision" (Pet. No. 74-1059, App. 22A).[8]

On the basis of this finding, the district court granted the government's motion to dismiss the Federal Tort Claims Act claims. It then granted the private defendants' motions for summary judgment on the related claims against them. Allegheny appealed, arguing that the finding that it was contributorily negligent was clearly erroneous. It contended that the private plane was not 500 feet below the clouds, and, therefore, it was impossible for the Allegheny jet to see and avoid the other plane. Allegheny also asserted that the district judge was prejudiced against it.

---

[7]"After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant * * * may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff * * *."

[8]Specifically, the district court found that the private plane was properly flying 500 feet below the clouds, and that the Allegheny plane had failed to maintain a proper lookout for the private plane, and to yield the right of way to it as required by the federal air regulations. The court also found that the Allegheny plane had descended at an excessive speed (Pet. No. 74-1059, App. 21A-22A).

The court of appeals reversed.[9] It agreed with the parties that the case turned on the question of the height of the cloud cover. But it disagreed with the district court's resolution of that factual question. The court held it error for the district court to rely upon a "weather observation" taken at Indianapolis airport eleven minutes after the accident showing the clouds to be at 4,197 feet above sea level, and upon the testimony of Allegheny's witnesses that, both prior to and subsequent to the accident, the cloud base at Indianapolis was exactly the same as the cloud base over the accident site (Pet. No. 74-1059, App. 7A-8A). Accordingly, the court of appeals held that the district court's finding that the private plane was flying at least 500 feet below the clouds was clearly erroneous (Pet. No. 74-1059, App. 8A).[10] It remanded the case for a new trial (Pet. No. 74-1059, App. 16A).

The United States petitioned for rehearing; the private defendants petitioned for rehearing and suggested rehearing *en banc*. The petitions were denied on November 26, 1974, Judges Stevens and Tone dissenting (Pet. No. 74-1059, App. 17A).

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted because the court of appeals' reversal of the district court's factual findings "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." Rule 19(1)(b) of the Rules of this Court.

---

[9]The panel consisted of Chief Judge Swygert, Judge Kiley, who died prior to issuance of the opinion, and District Judge Julius J. Hoffman, sitting by designation.

[10]The court also held, *inter alia*, that the finding that Allegheny's descent rate was excessive was in violation of a stipulation of the parties that such descents should be made "as rapidly as practicable" and that the evidence of another pilot concerning the customary rate of descent should not have been excluded (Pet. No. 74-1059, App. 9A). But the court noted that the importance of the finding concerning the descent rate depended on the finding concerning the cloud height (*id.* at 8A-9A).

Rule 52(a), Fed. R. Civ. P., allocates to the district court sitting as trier of fact the sole responsibility for resolving evidentiary conflicts, and for weighing the evidence, as this Court has repeatedly held. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123; *McAllister* v. *United States*, 348 U.S. 19, 20-21; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 278-279; *Walling* v. *General Industries Co.*, 330 U.S. 545, 550; *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, 37-38. The court of appeals here improperly assumed that responsibility.

The proper application of Rule 52(a) is essential to the effective administration of justice by the federal judiciary, both to insure that the district courts and courts of appeals perform the functions they are assigned, and to prevent further court congestion and delays resulting from unwarranted appeals by disappointed district court litigants hoping for a retrial at the court of appeals level. For these salutary reasons, this Court has often reinstated district court judgments improperly overturned on factual grounds by a court of appeals. *Crumady* v. *The J. H. Fisser*, 358 U.S. 423; *Snyder* v. *United States*, 350 U.S. 906; *Neese* v. *Southern Railway Co.*, 350 U.S. 77; *Harris* v. *Pennsylvania R. Co.*, 361 U.S. 15; *Davis* v. *Baltimore & Ohio R. Co.*, 379 U.S. 671.

The present case, too, clearly calls for the exercise of this Court's supervisory power to enforce the mandate of Rule 52(a). Here, the district court had the difficult task of weighing conflicting evidence in a complex set of circumstances, after years of discovery and a trial in which plaintiffs' evidence alone consumed six weeks.

Although the court of appeals asserted it was reviewing the record only to determine whether there was substantial evidence to support the district court's findings, in fact it reweighed the evidence, and reached a different conclusion concerning which testimony to credit. The errors made by the court of appeals are easily demonstrated, and do not require resort to the lengthy record below for reversal.

The fact that the court of appeals begins its analysis of the evidence concerning the cloud height with the comment that it finds Allegheny's evidence "persuasive" (Pet. No. 74-1059, App. 7A) at least suggests that it was reweighing the evidence, rather than considering whether substantial evidence supports the district court's conclusion.

Moreover, its analysis of the evidence on which the district court relied was erroneous for several reasons. First, the cloud height reading was not simply a "weather observation" (Pet No. 74-1059, App. 7A); it was a concededly accurate instrument reading. Indeed, the cloud height estimates of Allegheny's witnesses could be more accurately so described, since they were simply estimates based on individual recollections. In addition, the court of appeals found it significant that the witnesses who testified to the uniformity of the cloud height also estimated that it was lower than indicated by the instrument reading. But since the clouds could not have been both uniform and at the height the witnesses estimated,[11] it surely was proper for the district court to conclude that the witnesses' observations concerning the uniformity of the cloud cover were more likely to be accurate than their estimates of its height.[12]

---

[11]Unless, as was nowhere suggested, the instrument reading was erroneous.

[12]The court of appeals also states that these observations were made 30 to 40 minutes before and 30 to 40 minutes after the accident, apparently suggesting that conditions might have been different at the precise time of the accident (Pet. No. 74-1059, App. 8A). The statement is incorrect; Bradley's observations were contemporaneous (see n. 5, *supra*). In any event, Bradley testified that there was no change in the cloud conditions during the relevant times (Tr. 3430).

In sum, it is apparent from the face of its opinion that the court of appeals improperly reweighed the evidence evaluated by the district court.[13] This total disregard for the important policy underlying Rule 52(a) calls for reversal by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

MORTON HOLLANDER,
MICHAEL H. STEIN,
Attorneys.

MARCH 1975.

---

[13]The court of appeals' reversal of the district court's finding concerning G.E.C.C.'s interest in the suit constitutes yet another violation of Rule 52(a). See n. 3, *supra*.

LIBRARY
SUPREME COURT, U. S.
FIL
MAR 18
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1059

FORTH CORPORATION and LEE LEMAY, Administrator of the Estate of Robert W. Carey, Deceased,

Petitioners,

v.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WALTER E. RUTHERFORD, Esq.
One State Street Plaza
New York, N.Y. 10004

and

EMERSON BOYD, Esq.
Suite 2120, One Indiana Square
Indianapolis, Indiana 46204

Attorneys for Respondents Allegheny Airlines, Inc., and GECC Leasing Corp.

TABLE OF CONTENTS

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement 2

Argument 5

POINT I—The Court of Appeals correctly reviewed the record under Rule 52(a), F.R.C.P., and this case is not worthy of review 5

POINT II—Interpretation of local law is ordinarily not reviewed by the Supreme Court 7

POINT III—The opinion below was correct as to the use of collateral estoppel in jury and non-jury trials 8

Conclusion 10

TABLE OF CASES

Beacon Theatres v. *Westover*, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) 9

Bernhardt v. *Polygraphic Co.*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1955) 8

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967) 7

PAGE

Commissioner of Internal Revenue v. *Estate of Bosch*, 387 U. S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967) 8

Dairy Queen, Inc. v. *Wood*, 369 U. S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962) 10

Eli Lilly & Co. v. *Generix Drug Sales, Inc.*, 460 F. 2d 1096 (5th Cir. 1972) 10

Hamilton Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629 (1916) 7

Hays v. *Morgan*, 221 F. 2d 481 (5th Cir. 1955) 7

Hoebee v. *Howe*, 98 N. H. 168, 97 A. 2d 223 (1952) ... 7

Houston Oil Company v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918) 6

In re Mid-Air Collision Near Fairland, Indiana, 309 F. Supp. 621 (JPML 1970) 3

Lamasters v. *Snodgrass*, 248 Iowa 1377, 85 N.W. 2d 622 (1957) 7

Leimer v. *Woods*, 196 F. 2d 828 (8th Cir. 1952) 10

Local 783, Allied Industrial Workers v. *General Electric Co.*, 471 F. 2d 751 (6th Cir. 1973) 10

Lynne Carol Fashions, Inc. v. *Cranston Print Works Co.*, 453 F. 2d 1177 (3rd Cir. 1972) 10

MacGregor v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846 (1942) 8

National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 71 S. Ct. 470, 95 L. Ed. 483 (1951) 6

Pierson v. *Ray*, 386 U. S. 547, 558 fn. 12, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) 8

PAGE

Rogers v. *Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970), cert. den. 401 U. S. 1010 (1971) 7

Ross v. *Apple*, 240 N. E. 2d 825, rehearing denied 241 N. E. 2d 872 (Ind. App. 1968) 7

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924) 5

Steele v. *General Mills, Inc.*, 329 U. S. 433, 67 S. Ct. 439, 91 L. Ed. 402 (1947) 8

Tacon v. *Arizona*, 410 U. S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973) 5

United States v. *Johnson*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1059

FORTH CORPORATION and LEE LEMAY, Administrator of the Estate of Robert W. Carey, Deceased,

Petitioners,

v.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents Allegheny Airlines, Inc., and GECC Leasing Corp. submit this joint brief in opposition to the petition filed by Forth Corporation and Lee LeMay, Administrator of the Estate of Robert W. Carey, Deceased, for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Citations to Opinions Below

The opinion of the United States Court of Appeals is reported at 504 F. 2d 104 and is reproduced in Appendix A of the petition. The decision of the Court of Appeals denying petitioners' request for a rehearing *en banc* is re-

produced in Appendix B of the petition. A portion of the opinion by the United States District Court for the Southern District of Indiana is reproduced in Appendix D of the petition.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals properly apply Rule 52(a), F.R.C.P., in determining that the findings of fact by the District Court were clearly erroneous?

2. Did the Court of Appeals properly interpret Indiana statutes so as to impose financial responsibility on the owner of an aircraft who rents his aircraft to a negligent pilot?

3. Did the Court of Appeals correctly state in *dicta* the applicable law relating to the use of collateral estoppel in the consolidated trial of jury and non-jury issues?

Statutes Involved

The pertinent provisions of the Indiana statutes are set forth in Appendix C of the petition.

Statement

On September 9, 1969, in the airspace over Fairland, Indiana, a mid-air collision occurred between an Allegheny Airlines DC-9-31 jet aircraft* being operated as Flight No.

---

* One of the jet engines mounted on this aircraft was owned by GECC Leasing Corp. and had been leased to Allegheny Airlines.

853 and a Piper Cherokee aircraft being operated by student pilot Robert W. Carey. Both aircraft were totally destroyed and all occupants therein were killed. At the time of the collision the Allegheny aircraft was under an instrument flight rules (IFR) clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar vectors (directions) from Merrill T. McCammack, an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Weir Cook Airport, Indianapolis, Indiana. The Piper Cherokee aircraft was being operated under visual flight rules (VFR) on a student solo cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana. The Piper Cherokee was owned by the Forth Corporation, a wholly owned subsidiary of the Brookside Corporation. Lee LeMay is the duly appointed personal representative of Robert W. Carey.

The instant action was commenced on October 16, 1970, in the United States District Court for the Southern District of Indiana and immediately assigned to the Honorable Cale J. Holder, who had previously been designated by the Judicial Panel on Multidistrict Litigation to coordinate discovery in all lawsuits arising out of this accident. See *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621 (JPML 1970). Jurisdiction in the federal court was based upon diversity of citizenship and the Federal Tort Claims Act.

After all other litigation pending in the District Court arising out of this accident had been settled, the instant case proceeded to trial on October 10, 1972. At the conclusion of plaintiffs' case after twenty-seven trial days, Judge Holder directed a verdict in favor of Brookside Corporation; dismissed GECC as a party plaintiff on the ground that it was not the real party in interest; granted the Government's motion to dismiss under Rule 41(b), F.R.C.P., on the ground that the plaintiff Allegheny Air-

lines was contributorily negligent; allowed defendants Forth and LeMay to amend their answers to add the additional defenses of collateral estoppel based upon Judge Holder's determination of contributory negligence; denied plaintiffs' motions to dismiss said defenses as legally insufficient; granted the motions by defendants Forth and LeMay for summary judgment on said defenses; dismissed the complaint herein; discharged the jury, and entered judgments in favor of the defendants on November 29, 1972, and December 4, 1972, as against the plaintiffs. From these judgments, plaintiffs appealed.

On September 16, 1974, the United States Court of Appeals for the Seventh Circuit reversed the judgments entered below in favor of the United States, Forth Corporation and Lee LeMay, Administrator, etc., and ordered a new trial, and affirmed the judgment below in favor of Brookside Corporation. In reversing the judgments below, the Court of Appeals found that the District Court was clearly erroneous with respect to its findings of fact and improperly excluded certain evidence relating to the facts. The Court of Appeals further found that GECC Leasing Corp. was the real party in interest with respect to the engine claim, that the trial court had improperly stricken allegations of the complaint relating to vicarious liability under Indiana statutory and common law, and that directed verdicts on specified acts of negligence had been improperly granted in favor of the defendants.

Defendants Forth, LeMay and the United States moved for a rehearing *en banc,* which was denied by the Court of Appeals by a vote of six to two on November 26, 1974.

On February 24, 1975, Forth Corporation and Lee LeMay filed the instant petition for certiorari. The United States of America has been granted an extension of time to March 28, 1975, to decide whether or not it will petition for certiorari (No. A-677).

Argument

The petition for writ of certiorari should be denied because petitioners seek review of a non-final order granting a new trial; a new trial is necessary in any event because the trial judge improperly excluded evidence; a new trial is necessary in any event as to GECC Leasing Corp., which was held to be the real party in interest; this Court usually does not concern itself with an analysis and interpretation of the evidence; the opinion below with respect to collateral estoppel was *dicta* (although a correct interpretation of the law) and not ripe for review at this time; and, finally, the interpretation of the Indiana aircraft owner's financial responsibility act is correct and presents only an interpretation of local law which is ordinarily not reviewable by this Court.

POINT I.

The Court of Appeals correctly reviewed the record under Rule 52(a), F.R.C.P., and this case is not worthy of review.

Petitioners herein ask this Court to grant certiorari on the basis that the Court of Appeals improperly reviewed the evidence on appeal. In essence, they want this Court to review a 4,807-page trial transcript and thousands of pages of documentary exhibits to determine whether the Court of Appeals was correct in determining that the findings made by the trial judge were "clearly erroneous." As this Court stated in *United States* v. *Johnson,* 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925):

> "We do not grant a certiorari to review evidence and discuss specific facts." 268 U. S. at 227.

Accord: *Tacon* v. *Arizona,* 410 U. S. 351, 352, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed.

413 (1924); *Houston Oil Company* v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918); see *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503, 71 S. Ct. 470, 95 L. Ed. 483 (1951).

It is clear from the opinion by the Court of Appeals that the Circuit Court Judges approached their reviewing task with full knowledge and appreciation of their function:

> "In assessing the propriety of the district court's findings as to Allegheny's asserted contributory negligence, we note that the proper standard for review of such findings is whether they are clearly erroneous and not supported by substantial evidence." Petition, Appendix A, page 5A.

It is also clear that the Court of Appeals made a detailed analysis of the evidence and found no support for the District Court's findings. Another review of the evidence is not needed, especially after the Court of Appeals denied petitioners' motion for a rehearing *en banc*.

Furthermore, such a review would be useless because the Court of Appeals also found that the District Court improperly excluded evidence relating to the weather conditions and rate of descent. Petition, Appendix A, page 7A, fn. 4 and page 9A, fn. 6. The petitioners have not claimed in their petition that the Court of Appeals erred in this assessment of the rulings by the District Court. Therefore, since there was other material and relevant evidence relating to weather conditions and rate of descent that was not considered by the District Court, a new trial is necessary.

In addition, a new trial is necessary in any event because the Court of Appeals held that GECC Leasing Corp. was the real party in interest and should not have been dismissed from the lawsuit. The petitioners do not assign as error this ruling by the Court of Appeals. Therefore, any review by this Court, even if it resulted in a reversal on the

evidentiary point urged by petitioners, would still necessitate a new trial on the merits as to GECC Leasing Corp.

Since a new trial is inevitable in these proceedings, it would be wasteful to grant a review of this non-final order at this time. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 257-258, 36 S. Ct. 269, 60 L. Ed. 629 (1916).

POINT II.

Interpretation of local law is ordinarily not reviewed by the Supreme Court.

Petitioners seek to have this Court review the Court of Appeals' interpretation of the Indiana financial responsibility act for aircraft owners. They seek to confuse in their petition the cases interpreting the Federal Aviation Act of 1958, which does not impose vicarious liability on the absentee owner,[1] with those cases that impose such a liability under *state* financial responsibility acts.[2] Certainly, the Court of Appeals herein was the best judge of how Indiana would interpret its aircraft owners' financial responsibility act, especially when there was prior precedent by an Indiana court interpreting a similar act. *Ross* v. *Apple*, 240 N.E. 2d 825, rehearing denied 241 N.E. 2d 872 (Ind. App. 1968).

Since the issue presented herein by petitioners is merely an interpretation of local law, there appears no valid reason for this Court to grant certiorari. *Commissioner of Internal*

---

[1] *Rogers* v. *Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970), cert. den. 401 U. S. 1010 (1971).

[2] *Hays* v. *Morgan*, 221 F. 2d 481 (5th Cir. 1955); *Lamasters* v. *Snodgrass*, 248 Iowa 1377, 85 N.W. 2d 622 (1957); *Hosbee* v. *Howe*, 98 N. H. 168, 97 A. 2d 223 (1952).

Revenue v. *Estate of Bosch*, 387 U. S. 456, 462, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967); *Pierson* v. *Ray*, 386 U. S. 547, 558 fn. 12, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967); *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204-5, 76 S. Ct. 273, 100 L. Ed. 199 (1955); *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 438-9, 67 S. Ct. 439, 91 L. Ed. 402 (1947); *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846 (1942).

POINT III.

The opinion below was correct as to the use of collateral estoppel in jury and non-jury trials.

Petitioners also seek to have this Court review the *dicta* by the Court of Appeals with respect to how the District Court should utilize the doctrine of collateral estoppel when it has before it a trial involving jury and non-jury issues. The position taken by the Court of Appeals was clearly *dicta* (albeit persuasive *dicta*) in that the issue of collateral estoppel did not have to be reached since the judgment for Forth and LeMay was dependent upon the judgment in favor of the United States which was being reversed. In recognizing this problem, the Court of Appeals stated:

> "Although we need not directly pass on the propriety of the district court's action in implementing the doctrine of collateral estoppel, we are impelled to say that we strongly disapprove of the procedure utilized. We recognize the oddity of the instant litigation—a simultaneous trial of two actions involving the same facts and issues whereas the judge is trier of fact as to one defendant (the United States) while the jury is the trier of fact as to the remaining defendants. By entering a judgment on the merits for the Government and then applying the doctrine of collateral estoppel to preclude further action against

the remaining defendants, the trial judge substituted his findings for those which should have properly been determined by the jury. Such a procedure, although otherwise proper in form, in substance short circuits plaintiffs' right to a trial by jury in an action where the evidence is such that it would be most inappropriate to fail to submit the case to the jury by entering a directed verdict. In such circumstances plaintiffs' right to trial by jury is rendered meaningless. Consequently, we are of the view that the application of the doctrine of collateral estoppel was improper in light of the peculiarities of this case. *Rachal* v. *Hill,* 435 F. 2d 59 (5th Cir. 1970). The Government's case could be properly decided by the judge while at the same time plaintiffs' case against the remaining defendants should be submitted to the jury. Moreover, in an effort to avoid inconsistency in verdicts the better practice might be to submit plaintiffs' case to the jury which would function in two capacities: (1) it would render a verdict as to those defendants other than the Government, and (2) it would act as an advisory jury with respect to plaintiffs' case against the Government pursuant to the Federal Tort Claims Act." Petition, Appendix A, p. 10A, fn. 7.

The position taken by the Court of Appeals was perfectly correct, constituted sound judicial administration, and was in accord with prior precedents of this Court. Thus, in *Beacon Theatres* v. *Westover,* 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), this Court held:

"'In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.' This long-standing principle of equity dictates that only under the most imperative circum-

stances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U. S. at 510-511.

Accord: *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962); *Leimer* v. *Woods*, 196 F. 2d 828 (8th Cir. 1952); *Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1107 (5th Cir. 1972); *Local 783, Allied Industrial Workers* v. *General Electric Co.*, 471 F. 2d 751 (6th Cir. 1973); *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, 453 F. 2d 1177 (3rd Cir. 1972).

In view of the foregoing, there is no reason whatsoever for this Court to review the position taken by the Court of Appeals with respect to collateral estoppel.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WALTER E. RUTHERFORD, Esq.
One State Street Plaza
New York, N.Y. 10004

and

EMERSON BOYD, Esq.
Suite 2120, One Indiana Square
Indianapolis, Indiana 46204

Attorneys for Respondents Allegheny Airlines, Inc., and GECC Leasing Corp.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 24 1975
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1223

UNITED STATES OF AMERICA,

Petitioner,

v.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WALTER E. RUTHERFORD, Esq.
One State Street Plaza
New York, N. Y. 10004

and

EMERSON BOYD, Esq.
Suite 2120, One Indiana Square
Indianapolis, Indiana 46204
Attorneys for Respondents Allegheny Airlines, Inc., and GECC Leasing Corp.

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Argument	4
POINT I—The Court of Appeals correctly reviewed the record under Rule 52(a), F.R.C.P., and this case is not worthy of review	4
POINT II—The decision below was clearly correct	6
Conclusion	12

TABLE OF CASES

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967)	6
Eggenschwiler v. *Midwestern Motor Lodge Corp.*, 286 F. 2d 765 (7th Cir. 1961)	11, 12
Hamilton Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629 (1916)	6
Houston Oil Company v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918)	5

PAGE

In re Mid-Air Collision Near Fairland, Indiana, 309 F. Supp. 621 (JPML 1970) 3

National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 71 S. Ct. 470, 95 L. Ed. 483 (1951) 5

Schmidt v. *Liesenfeld*, 379 F. 2d 380 (7th Cir. 1967) ..11, 12

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 69 L. Ed. 413 (1924) 5

Tacon v. *Arizona*, 410 U. S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973) 5

United States v. *Johnson*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925) 4

United States v. *United States Gypsum Co.*, 333 U. S. 364, 63 S. Ct. 525, 92 L. Ed. 746 (1948) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1223

UNITED STATES OF AMERICA,

Petitioner,

v.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents Allegheny Airlines, Inc., and GECC Leasing Corp. submit this joint brief in opposition to the petition filed by the United States of America for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Citations to Opinions Below

The opinion of the United States Court of Appeals is reported at 504 F. 2d 104. The findings and conclusions of the District Court are unreported.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

Question Presented

Did the Court of Appeals properly apply Rule 52(a), F.R.C.P., in determining that the findings of fact by the District Court were clearly erroneous?

Statement

On September 9, 1969, in the airspace over Fairland, Indiana, a mid-air collision occurred between an Allegheny Airlines DC-9-31 jet aircraft* being operated as Flight No. 853 and a Piper Cherokee aircraft being operated by student pilot Robert W. Carey. Both aircraft were totally destroyed and all occupants therein were killed. At the time of the collision the Allegheny aircraft was under an instrument flight rules (IFR) clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar vectors (directions) from Merrill T. McCammack, an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Weir Cook Airport, Indianapolis, Indiana. The Piper Cherokee aircraft was being operated under visual flight rules (VFR) on a student solo cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana. The Piper Cherokee was owned by the Forth Corporation, a wholly owned subsidiary of the Brookside Corporation. Lee LeMay is the duly appointed personal representative of Robert W. Carey.

The instant action was commenced against the United States, Forth Corporation, Brookside Corporation and Lee LeMay as Administrator of the Estate of Robert W. Carey, deceased, on October 16, 1970, in the United States District Court for the Southern District of Indiana and immediately

---

* One of the jet engines mounted on this aircraft was owned by GECC Leasing Corp. and had been leased to Allegheny Airlines.

assigned to the Honorable Cale J. Holder, who had previously been designated by the Judicial Panel on Multidistrict Litigation to coordinate discovery in all lawsuits arising out of this accident. See *In re Mid-Air Collision Near Fairland, Indiana,* 309 F. Supp. 621 (JPML 1970). Jurisdiction in the federal court was based upon diversity of citizenship and the Federal Tort Claims Act.

After all other litigation pending in the District Court arising out of this accident had been settled, the instant case proceeded to trial on October 10, 1972. At the conclusion of plaintiffs' case after twenty-seven trial days, Judge Holder directed a verdict in favor of Brookside Corporation; dismissed GECC as a party plaintiff on the ground that it was not the real party in interest; granted the Government's motion to dismiss under Rule 41(b), F.R.C.P., on the ground that the plaintiff Allegheny Airlines was contributorily negligent; allowed defendants Forth and LeMay to amend their answers to add the additional defenses of collateral estoppel based upon Judge Holder's determination of contributory negligence; denied plaintiffs' motions to dismiss said defenses as legally insufficient; granted the motions by defendants Forth and LeMay for summary judgment on said defenses; dismissed the complaint herein; discharged the jury, and entered judgments in favor of the defendants on November 29, 1972, and December 4, 1972, as against the plaintiffs. From these judgments plaintiffs appealed.

On September 16, 1974, the United States Court of Appeals for the Seventh Circuit reversed the judgments entered below in favor of the United States, Forth Corporation and Lee LeMay, Administrator, etc., and ordered a new trial, and affirmed the judgment below in favor of Brookside Corporation. In reversing the judgments below, the Court of Appeals found that the District Court was clearly erroneous with respect to its findings of fact and improperly excluded certain evidence relating to the facts. The Court of Appeals further found that GECC Leasing Corp. was the real party in interest with respect to the

engine claim, that the trial court had improperly stricken allegations of the complaint relating to vicarious liability under Indiana statutory and common law, and that directed verdicts on specified acts of negligence had been improperly granted in favor of the defendants.

Defendants Forth, LeMay and the United States moved for a rehearing *en banc*, which was denied by the Court of Appeals by a vote of six to two on November 26, 1974.

On February 24, 1975, Forth Corporation and Lee LeMay filed a joint petition for certiorari in this Court (Docket No. 74—1059). The Government docketed the instant petition on March 27, 1975.

Argument

The petition for writ of certiorari should be denied because petitioner seeks review of a non-final order granting a new trial; a new trial is necessary in any event because the trial judge improperly excluded evidence; a new trial is necessary in any event as to GECC Leasing Corp., which was held to be the real party in interest; this Court usually does not concern itself with an analysis and interpretation of the evidence; and the opinion below was correct.

POINT I

The Court of Appeals correctly reviewed the record under Rule 52(a), F.R.C.P., and this case is not worthy of review.

Petitioner asks this Court to grant certiorari on the basis that the Court of Appeals improperly reviewed the evidence on appeal. In essence, it wants this Court to review a 4,807-page trial transcript and thousands of pages of documentary exhibits to determine whether the Court of Appeals was correct in determining that the findings made by the trial judge were "clearly erroneous." As this Court stated in *United States* v. *Johnson*, 268 U. S. 220, 45 S. Ct.

496, 69 L. Ed. 925 (1925):

> "We do not grant a certiorari to review evidence and discuss specific facts." 268 U. S. at 227.

Accord: *Tacon* v. *Arizona*, 410 U. S. 351, 352, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924); *Houston Oil Company* v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918); see *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503, 71 S. Ct. 470, 95 L. Ed. 483 (1951).

It is clear from the opinion by the Court of Appeals that the Circuit Court Judges approached their reviewing task with full knowledge and appreciation of their function:

> "In assessing the propriety of the district court's findings as to Allegheny's asserted contributory negligence, we note that the proper standard for review of such findings is whether they are clearly erroneous and not supported by substantial evidence." 504 F. 2d at 108.

It is also clear that the Court of Appeals made a detailed analysis of the evidence and found no support for the District Court's findings. Another review of the evidence is not needed, especially after the Court of Appeals denied petitioner's motion for a rehearing *en banc*.

Furthermore, such a review would be useless because the Court of Appeals also found that the District Court improperly excluded evidence relating to the weather conditions and rate of descent. 504 F. 2d at 109, fn. 4, and at 111, fn. 6. The petitioner has not assigned as error on this petition that the Court of Appeals was wrong in its assessment of the rulings by the District Court. Therefore, since there was other material and relevant evidence relating to weather conditions and rate of descent that was not considered by the District Court, a new trial is necessary.

In addition, a new trial is necessary in any event because the Court of Appeals held that GECC Leasing Corp.

was the real party in interest and should not have been dismissed from the lawsuit. The only "question presented" by the petitioner relates to the contributory negligence of Allegheny Airlines. Therefore, any review by this Court, even if it resulted in a reversal on the evidentiary point urged by petitioner, would still necessitate a new trial on the merits as to GECC Leasing Corp.

Since a new trial is inevitable in these proceedings, it would be wasteful to grant a review of this non-final order at this time. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 257-258, 36 S. Ct. 269, 60 L. Ed. 629 (1916).

POINT II

The decision below was clearly correct.

The Government basically argues in its petition that, because there was *some* evidence (implausible as it may be) to support the District Court's finding as to cloud height, it was error for the Court of Appeals to reverse. This argument ignores the standard for appellate review of findings of fact. The acknowledged standard is that set forth by Mr. Justice Reed in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 63 S. Ct. 525, 92 L. Ed. 746 (1948):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U. S. at 395.

In reviewing the evidence, the Court of Appeals was aware that the collision occurred in an area approximately 20 nautical miles southeast of Weir Cook Airport located at Indianapolis, Indiana, and approximately 18 nautical miles north of Bakalar Air Force Base located at Columbus, Indiana. The Government conceded the collision altitude

to be 3,600 to 3,639 feet above mean sea level (MSL) (T. 4670-1). Weir Cook Airport is 797 feet above sea level and Bakalar is 656 feet above sea level. The time of collision was 1929 GMT (3:29 P.M. local time, i.e., E.D.T.).

Insofar as the base of the clouds is concerned, respondents introduced two photographs, a weather satellite photograph taken one minute before the collision (T. 3476-81) and a color photograph taken by an eyewitness approximately ten minutes after the accident (T. 421-2), which clearly show the presence of clouds in the collision area.

Mason McGraw, an eyewitness, testified that he saw the aircraft fall from the sky and the sky was ninety-five per cent cloudy with some light emitting through the clouds (T. 374-80).

Alpha Hammersley, the eyewitness who took the color photograph of the clouds, testified that she saw the Allegheny aircraft falling from the sky and in that area all of the sky was covered with clouds (T. 393).

Evan McColly, a meteorological technician employed by the United States National Weather Service, testified that he was on duty at Weir Cook Airport on September 9, 1969, and that he took numerous weather observations on that date (T. 430). The official United States Weather Bureau report for Weir Cook Airport on that date was admitted into evidence. Mr. McColly testified that at his 1255 local standard time observation (1755 GMT) the base of the clouds was measured at 2900′ above the ground (3697′ MSL) in a broken condition (.8 coverage) (T. 448). At 1355 LST (1855 GMT) the base of the clouds was estimated at 2900′ above ground level (3697′ MSL) and again with .8 sky coverage (T. 452). Shortly after the accident, at 1940 GMT McColly again took an observation and reported the base of the clouds at 3400 broken (4197′ MSL) with a 5000′ overcast (5797′ MSL, more than .9 coverage) (T. 454-6). Mr. McColly further testified that although he was the weather observer on duty at the time

of this accident, he was never requested by any Government agency after the accident to do an analysis of the weather in the area (T. 458).

Franklin Bellamy, who was a meteorological technician employed by the United States Air Force on September 9, 1969, testified that he took weather observations at Bakalar Air Force Base on that date and the official U. S. Weather Bureau report for those observations was admitted into evidence (T. 489-91). At 1658 GMT (1258 EDT) Bellamy observed and reported the base of the clouds at Bakalar as an estimated 2500′ above ground level (3156′ MSL) with another deck of clouds estimated at 8000′ AGL and with the sky cover at eight-tenths (T. 491-2). At 1755 GMT (1355 EDT) Bellamy again estimated the cloud base at 2500′ AGL (3156′ MSL) and 8000′ AGL with sky cover of eight-tenths (T. 493-5). At 1858 GMT (1458 EDT) the estimated cloud base was again 2500′ AGL (3156′ MSL) and 8000′ with a total sky cover of eight-tenths (T. 495).

Frank Griffith, a meteorological technician employed by the National Weather Service, testified that he was a weather observer at Bakalar on September 9, 1969, employed by the United States Air Force. Mr. Griffith testified that on said date he made a weather observation at 1957 GMT (1557 EDT) and estimated the base of the clouds at 2800′ above ground level (3456′ MSL) and 8000′ AGL with a total sky cover of eight-tenths (T. 514-6). At 2057 GMT (1657 EDT) Griffith made another observation and reported the base of the clouds at an estimated 2600′ above ground level (3256′ MSL) and 8000′ AGL and total sky cover of nine-tenths (T. 516-7). The official Weather Bureau report also contained a notation of a pilot report at 2008 GMT that the base of the clouds in the area was at 3300′ MSL (T. 518).

Captain Robert F. Johannesen, an American Airlines pilot, testified that on September 9, 1969, he flew a jet aircraft into Indianapolis along almost the identical route

as Allegheny 853 at approximately 1855 GMT (1455 EDT) (T. 3064-6). Captain Johannesen testified that when he was descending in the area southwest of the SHB VOR from 6000′ to 2500′ MSL, he flew into a thin overcast condition at approximately 6000′ and then through that into a broken layer which had a base at 3500′ MSL, which extended all the way to Indianapolis (T. 3068). Captain Johannesen estimated the sky cover of the broken layer at six-tenths (T. 3069).

Roy Whitehead, a general aviation pilot flying in the Indianapolis area on September 9, 1969, testified that he contacted IND Tower at a position 15 miles southeast of Weir Cook Airport at an altitude of 2500′ MSL at 1938:58 GMT inbound to Shank Airport (T. 3256-61). Whitehead further testified that he observed the weather in the area and that there was a broken layer of clouds the base of which was at 3000′ MSL with 70-80 per cent sky coverage (T. 3264-7).

Charles King, another general aviation pilot flying in the Indianapolis area on September 9, 1969, testified that he departed Shank Airport at approximately 1900 GMT bound for Louisville (T. 3294). Mr. King testified that after departing Shank he climbed to 2500′ MSL and headed in a general southeasterly direction (T. 3298). Mr. King contacted the IND Tower for radar service and maintained radar contact with them until 1911 GMT, when he was at a point 20 miles southeast of Weir Cook Airport (T. 3301). Mr. King further testified that he observed the weather at the point 20 miles southeast of the airport and that it was a broken to overcast condition with the base of the clouds at 3500′ MSL (T. 3302-4).

Frederick Schweibold, a helicopter pilot, was radar-vectored by IND Tower to the crash site within a half hour after the accident at an altitude of 1800 to 2500′ MSL (T. 3355-8). At 2010 GMT Schweibold was directly over the accident site and ascended his helicopter to within 500′ of the base of the clouds, which he judged to be between

3100 and 3300′ MSL. The cloud cover, in Schweibold's opinion, was overcast with an occasional ray of sunshine (T. 3359-61).

Phyllis Haupt, a general aviation pilot, was giving flight instruction in the Indianapolis area on September 9, 1969, when she was asked by the IND Tower to search for the downed Allegheny aircraft (T. 3379). Mrs. Haupt located the accident site at approximately 2010 GMT (T. 3383-4). At that time she deliberately observed the weather conditions in the area because she knew she would be later questioned about it (T. 3389-90). She testified that it was overcast, with slight breaks in the overcast, and that the base of the clouds was 3000 to 3500′ MSL (T. 3384, 3389).

Charles Bradley, who accompanied Mrs. Haupt in the search for the downed aircraft, testified that the weather in the area and over the accident site was a broken to overcast condition with the base of the clouds at 3600 to 3900′ MSL (T. 3419-25).

The final witness to testify concerning the weather was Conrad Gosset, a meteorologist, with a Master of Science Degree, retained as an expert by the respondents. Mr. Gosset made a complete review of all applicable weather information including official United States weather reports and testified that in his opinion at the time and place of the accident the base of the clouds was 3700′ MSL and that at this altitude the clouds covered between seven- and eight-tenths of sky. There was also a broken layer of clouds above this initial deck with a cloud coverage of eight- to nine-tenths. The winds aloft were blowing from the north-northwest to the south-southeast at a speed of 15 to 23 knots at altitudes of 3000 and 4000′ (T. 3472-5). This airflow caused cloud formations to drift from the north-northwest to the south-southeast (T. 3469-70).

The accident site was approximately 20 nautical miles southeast of Weir Cook Airport and approximately 18 nautical miles north of Bakalar Air Force Base. Evan McColly, the weather observer at Weir Cook Airport, tes-

tified that his observation at 1855 GMT (34 minutes before the accident) showed the clouds at 2900′ above the airport (3697′ MSL). This was the same as his observation at 1755 GMT. These 1755 and 1855 cloud formations are the ones that were moving south-southeast towards the accident site and towards Bakalar Air Force Base and could be expected to be over the accident site at the time of the collision, and not the clouds observed *over Weir Cook Airport ten minutes after the accident.*

Frank Griffith, another National Weather Service technician, observed the weather at Bakalar at 1957 GMT (27 minutes after the collision) and reported the cloud bases at 2800′ above the airport (3456′ MSL), and at 2057 GMT (1 hour and 28 minutes after the collision) he reported the clouds at 2600′ above ground level (3256′ MSL). These are the clouds that would have drifted down from the north-northwest.[1]

If the logic of the drifting cloud formations is considered along with the *impartial* observations of the pilots in the area (which ran from a low of 3000′ MSL to a high of 3900′ MSL), and this evidence is combined with the opinion of the *only* expert meteorologist who testified as to the weather at the time and place of collision (3700′ MSL), then it is simply impossible to establish that there was substantial evidence,[2] much less a preponderance of evidence,[3] that the Cherokee was operating 500′ or more below the cloud base.

---

[1] The proffered testimony of the controller at Bakalar, which the District Court refused to accept and which the Court of Appeals held was error, indicated that ten minutes after the collision the weather was "closing in" on Bakalar and "getting darker."

[2] Petitioner's passing reference to the testimony of Charles Bradley in support of its position does not withstand a careful reading. Charles Bradley was in the area 30-40 minutes after the collision and he estimated the cloud base at 3600 to 3900′ MSL. In the same aircraft with Mr. Bradley was Phyllis Haupt, a much more experienced pilot who deliberately observed the weather conditions because she knew she would be asked about them, and she estimated the cloud base between 3000 and 3500′ MSL. At the same

(*footnote continued on following page*)

The Court of Appeals was therefore clearly correct when, upon a review of the entire record, it was convinced that a mistake had been committed and the District Court's finding as to the height of the clouds was clearly erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WALTER E. RUTHERFORD, Esq.
One State Street Plaza
New York, N. Y. 10004
and
EMERSON BOYD, Esq.
Suite 2120, One Indiana Square
Indianapolis, Indiana 46204
Attorneys for Respondents
Allegheny Airlines, Inc.,
and GECC Leasing Corp.

(*footnote continued from preceding page*)

time that Bradley and Mrs. Haupt were in the area, Frederick Schweibold ascended his helicopter right over the accident site to within 500′ of the base of the clouds, which he judged to be between 3100 and 3300′ MSL.

Likewise, there is no concession as to the accuracy of the ceilometer at Weir Cook Airport. Indeed, even though the Weir Cook weather observer testified, the Government did not choose to utilize him to identify the ceilometer trace or introduce it in evidence.

[3] The burden of proof as to contributory negligence rested with the defendant. *Eggenschwiler* v. *Midwestern Motor Lodge Corp.*, 286 F. 2d 765 (7th Cir. 1961); *Schmidt* v. *Liesenfeld*, 379 F. 2d 380 (7th Cir. 1967).